Supreme Court, U. S.
FILED
MAY 27 1975
MICHAEL RODAK, JR., CLERK

No. 74-1486

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

CALMAN BERNSTEIN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ROBERT H. BORK,
Solicitor General,

JOHN C. KEENEY,
Acting Assistant Attorney General,

HARRIET S. SHAPIRO,
Assistant to the Solicitor General,

JEROME M. FEIT,
MARC PHILIP RICHMAN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutory provision involved	2
Statement	4
Reasons for granting the writ	7
Conclusion	19
Appendix A	1a
Appendix B	19a
Appendix C	20a
Appendix D	21a
Appendix E	32a
Appendix F	52a

CITATIONS

Cases:

Hoffa v. *United States*, 385 U.S. 293	19
Smith v. *United States*, 360 U.S. 1	19
United States v. *Bellosi*, 501 F.2d 833	16
United States v. *Chavez*, 416 U.S. 562	18, 19
United States v. *Curreri*, 363 F.Supp. 430	5

Cases—Continued — Page

United States v. *Donovan*, C.A. 6, No. 74-1553, decided March 17, 1975 — 8
United States v. *Doolittle*, 501 F.2d 1368 — 7
United States v. *Eastman*, 465 F.2d 1057 — 13
United States v. *Kahn*, 415 U.S. 143 — 6, 8, 9, 14, 17
United States v. *Giordano*, 416 U.S. 505 — 7, 15, 18
United States v. *Tortorello*, 480 F.2d 764, certiorari denied, 414 U.S. 866 — 13-14
United States v. *White*, 401 U.S. 745 — 19
United States v. *Wolk*, 466 F.2d 1143 — 13

Statutes:

18 U.S.C. 1955 — 5
18 U.S.C. 2511(2)(d) — 19
18 U.S.C. 2518(1)(b)(iv) — 2-3, 8, 13, 14
18 U.S.C. 2518(4)(a) — 3, 8
18 U.S.C. 2518(5) — 9, 15
18 U.S.C. 2518(8)(d) — 14, 17

Miscellaneous:

Report on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications, Administrative Office of the United States Courts (January 1, 1974 to December 31, 1974) — 12
S. Rep. No. 1097, 90th Cong., 2d Sess. (1968) — 17

In the Supreme Court of the United States

OCTOBER TERM, 1974

No.

UNITED STATES OF AMERICA, PETITIONER

v.

CALMAN BERNSTEIN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-18a) is reported at 509 F.2d 996. The opinions of the district court (Apps. D and E, *infra*, pp. 21a-51a) are reported at 363 F. Supp. 438 and 368 F. Supp. 757.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1975 (App. B, *infra*, p. 19a). A petition for rehearing with a suggestion for rehearing *en banc* was denied on March 28, 1975 (App. C, *infra*, p. 20a). On April 24, 1975, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 27, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 2518(1)(b)(iv) requires the identification in a telephone interception application of all persons who the government has probable cause to believe will participate in conversations over the telephone line relating to the specified illegal activity.

2. Whether, if the statute is read to require the naming of all such persons, a good faith failure to identify one such person is grounds for suppression as to him of the evidence derived from the otherwise lawful interception of his conversations.

STATUTORY PROVISION INVOLVED

18 U.S.C. 2518. *Procedure for interception of wire or oral communications.*

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing

upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information;

* * * * *

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including * * * (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

* * * * *

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

* * * * *

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

* * * * *

STATEMENT

On March 30, 1972, Judge Watkins of the United States District Court for the District of Maryland issued an order pursuant to Title III of the Omnibus Crime Control and Safe Streets Act authorizing the interception of communications of "Robert C. Curreri, an individual known as Bernice and others as yet unknown" over four telephones used by Curreri in conducting his gambling business (C.A. App. 39-42). The authorization was effective for a period of 15 days. On April 14, 1972, Judge Watkins extended the March 30 order for an additional 15 days with respect to three of the four telephones involved in the March 30 order. The April 14 order stated that the three telephones were used by "Robert S. Curreri, Gina Gomez, John Thomas Chalk, Frank Kagler, Willie Reaves, Jr., and others as yet unknown" in connection with Curreri's gambling business (C.A. App. 69-72).[1]

Respondent Calman Bernstein and nine others were subsequently charged with conducting an illegal

[1] On May 1 and May 17, 1972, Judge Watkins authorized two additional 15-day periods of interceptions of communications of Curreri and others (C.A. App. 114-117, 141-144); those two interceptions are not pertinent to the issues raised herein.

gambling business in violation of 18 U.S.C. 1955 (C.A. App. 12-13).[2] The defendants filed several pretrial motions to suppress evidence derived from the wire interceptions, which were denied by District Judge Blair (*United States* v. *Curreri*, 363 F. Supp. 430, 438). Bernstein also moved to suppress evidence derived from the March 30 and April 14 interceptions on the ground that the government failed to identify him in the intercept applications and orders. In a separate memorandum and order (App. D, *infra*), Judge Blair ordered that an evidentiary hearing be held on that motion to determine whether there was "strong and clear, and not questionable, * * * probable cause existing at the time of the application" that Bernstein was both involved in the criminal activity under investigation and likely to use the target telephones in furtherance of that activity (App. D, *infra*, p. 29a).[3]

[2] The nine persons indicted with Bernstein included one of the individuals named in the April 14 order, Gomez. Curreri and the others named in the order were among those included in a separate indictment. The cases were consolidated for trial; one defendant died, and all the others except Bernstein have pleaded guilty (C.A. App. 10-11).

[3] Judge Blair believed that the "strong and clear" standard avoided the difficulty he recognized with a simple probable cause standard, which "could put the government in a awkward and unfairly precarious position of having to choose whether to name the individual in the application when questionable probable cause exists and risk being turned down by the authorizing judge as to that person, or proceed to investigate under the authorization of 'others yet unknown' and face a possible challenge that the individual should have been named in the order" (App. D, *infra*, p. 29a).

After the hearing, Judge Blair concluded that there was not sufficiently strong probable cause that Bernstein would use the target phone to justify identifying him in the original application and the March 30 order, but that after he was heard discussing gambling with Curreri on April 11, he should have been named in the application for the April 14 extension order (App. E, *infra*, p. 41a).[4] Accordingly, Judge Blair denied the motion to suppress with respect to interceptions made under the original order but granted respondent's motion as to his conversations overheard under the April 14 extension order.

The court of appeals affirmed the district court's order suppressing for use against respondent his conversations intercepted under the April 14 order (App. A, *infra*). Relying on dictum in *United States* v. *Kahn*, 415 U.S. 143, 155, the court held that the government must identify every person who it has probable cause to believe is both committing the crime being investigated and conversing on the telephone line that is being monitored (App. A, *infra*, p. 12a). Presumably applying the simple probable cause test rejected by the district court, the court held that "[a] detached observer could conclude from the evidence available before April 14 that the government

[4] There was a conversation on April 12 containing a passing reference to Bernstein. The court did not consider this in evaluating probable cause for the application for the April 14 extension order, recognizing that "the sheer mechanics of the tap would not enable the government to process the information quickly enough to utilize it in the application of April 14 (App. E, *infra*, p. 44a).

had probable cause to believe that Bernstein was still handling Curreri's layoff and on occasion would talk with him about the business on a tapped phone" (*id.* at 15a).

The court of appeals further concluded that the identification requirements were essential to the congressional purpose of assuring adequate executive and judicial review of interception authorizations, and thus that, under the test enunciated in *United States* v. *Giordano*, 416 U.S. 505, the failure to identify Bernstein required suppression (App. A, *infra*, pp. 4a-11a).

REASONS FOR GRANTING THE WRIT

The decision below poses serious practical problems for administration of the authority conferred by Congress to utilize electronic interceptions for law enforcement. It does so, moreover, without significantly furthering any substantial policy interest. The result reached by the court of appeals is not required either by the plain language of the statute, congressional intent, or prior decisions of this Court. It is important to the future administration of Title III that this Court resolve the issues presented by this petition.[5]

[5] The decision below conflicts with that of the panel in *United States* v. *Doolittle*, 507 F. 2d 1368 (C.A. 5). In *Doolittle*, upon facts similar to those in the instant case, the court held that in the absence of prejudice to the defendant or evidence of government bad faith, suppression was not required because there was substantial compliance with Title III. Since, however, the Fifth Circuit granted the defend-

1. The decision of the court of appeals represents an unwarrantedly expansive reading of the statutory language, which requires the identification in applications for interception orders of only one "person, if known, committing the offense and whose communications are to be intercepted" (18 U.S.C. 2518 (1)(b)(iv)),[6] not of any and all such persons. The interpretation most consistent with the statutory language, accordingly, is that, although it would ordinarily be expected that many persons will be overheard, only the principal target of the interception (ordinarily the individual whose phone is to be monitored) need be named; thus, the statute does not require the naming of all those with whom the target could be expected to discuss illegal activities or who might predictably use the target telephone to discuss such activities.[7] Instead, once the principal target is

---

ants' petition for a rehearing *en banc* in *Doolittle* on April 7, 1975, we do not here contend that review by this Court is presently necessary to resolve an established conflict among the circuits. *United States* v. *Donovan*, C.A. 6, No. 74-1553, decided March 17, 1975, petition for rehearing *en banc* pending, is in accord with the instant case.

[6] The further requirement in 18 U.S.C. 2518(4)(a) that the interception order specify the "identity of the person, if known, whose communications are to be intercepted" simply tracks the identification requirement for the application. *United States* v. *Kahn*, 415 U.S. 143, 152.

[7] The application at issue here in fact named, in addition to the principal target, Curreri, four other individuals whom the agents expected to overhear conversing about gambling. We submit that the identification of these persons was not required by the statute; it was made because of uncertainty regarding the matter that we are here asking this Court to resolve.

named, all conversations relating to the illegal enterprise on the target phone may be properly overheard.[8] It is established that all such conversations involving the named target and those who were not known to be his co-conspirators when the order issued may be so overheard (*United States* v. *Kahn*, 415 U.S. 143). We contend simply that the rule should be no different when one of the participants is a person, other than the principal target, who was known but not identified.

The court below held instead that each and every person who the government has probable cause to believe will use the intercepted telephone for illegal purposes must be named in the application and order and, further, that a failure so to name any such person warrants suppression as to him of his intercepted conversations.

2. The decision below creates serious practical difficulties for law enforcement. While it is easy to state the requirement that a person must be identified whenever the government has probable cause to believe that his conversations relating to the offense being investigated will be intercepted, it is far more difficult to apply that standard.

---

[8] Congress protected the rights of users of the monitored telephones by providing for minimization of the interception of conversations not relating to the offense under investigation (18 U.S.C. 2518(5)). That is, the limitation is drawn on the basis of the *types* of conversations to be intercepted, rather than of the identity of the participants in the conversations.

The facts of this case demonstrate that difficulty. The draft of the affidavit to accompany the application for the original interception authorization, prepared by the FBI agent in charge of this case, did name respondent Bernstein, because the agent concluded that there was probable cause to believe Bernstein would be overheard (C.A. App. 429, 431). When the proposed affidavit was reviewed in Washington, however, Bernstein's name was stricken on the ground that the information concerning him was stale (C.A. App. 421). Since the agent was thereafter unable to obtain sufficient additional information concerning Bernstein's participation, his name was omitted from the original application submitted to the district court and from the March 30 order based thereon (C.A. App. 342). The district court, in considering the suppression motion, agreed that there had been insufficient probable cause to believe that Bernstein would discuss the gambling operation on the intercepted phones to justify naming him in the March 30 application and order (App. E, *infra*, p. 42a).

The target telephones were monitored pursuant to the March 30 order from April 1 until April 14, when an extension order was issued. Although 48 gambling conversations were intercepted during the first 10 days, none of them involved Bernstein, the suspected "layoff man" [9] (C.A. App. 51). Although a numbers

[9] In order to avoid high losses in a gambling operation when too much money is bet on a given chance, some of the bets are transferred to someone else. These bets are said to be "laid off," and the transferee is known as the "layoff man" (App. E, *infra*, p. 40a, n. 1).

bookmaker ordinarily is in daily communication with his "layoff man," Bernstein did not talk to Curreri on a target phone until April 11 at about 5:17 p.m.[10] Moreover, the conversation related not to layoffs but to Curreri's anger at having paid off on an incorrect number the day before and to procedures designed to avoid a recurrence of that mistake. Bernstein told Curreri that he had told someone else to report the error to Curreri, but promised that in the future in such cases "anytime I find it out, if it's four o'clock in the morning, I'll call" (App. F, *infra*, p. 58a).

This telephone call indicated that Bernstein ordinarily told others to make calls, rather than doing so himself; he did promise to call if he should discover again that an incorrect number had been reported. The total interception between April 1 and 14 indicated that if Bernstein was Curreri's "lay-off man," he operated in a manner that avoided his use of the target phone lines. Nevertheless, on the basis of this single call, the courts below found (App. A, *infra*, p. 14a; App. E, *infra*, pp. 43a-45a) that when the application for the April 14 order was prepared, there was probable cause to believe Bernstein would thereafter be intercepted using the target phones to discuss gambling, and thus that he should have been named in the extension application.

The facts of this case thus illustrate the fine questions of judgment that investigating agents will face if they must determine whether a court will later hold that there was probable cause to identify persons

[10] This conversation is reproduced in Appendix F, *infra*.

other than the primary target in interception applications.[11] Moreover, these questions are likely to arise, as they did here, in the course of complex and fast moving investigations. Here, more than 30 individuals, identified in their conversations only by code names or nicknames, were overheard in 49 gambling-related conversations in the first 10 days of the interception (C.A. App. 51, 66).[12] The crucial call was overheard on April 11th, and the extension order was granted April 14th.

It is in this context that the court below would require the application to identify, on the basis of the probable cause standard, every person whose illegal conversations may be expected to be overheard. This requirement is not, moreover, confined to those whose phones are being monitored, but extends to any person anywhere in the world who may be expected to use an unmonitored phone to place a call to the target phone. And the penalty for a determi-

[11] The precise conclusion of the court of appeals was that "[a] detached observer could conclude from the evidence available before April 14 that the government had probable cause * * *" (App. A, *infra*, p. 15a). While that may be true, the practical problem arises because a detached observer could also reach the oposite conclusion, and the agent must guess which alternative will eventually seem more reasonable to a reviewing court.

[12] In 1974, an average of 48 persons were overheard as a result of each electronic surveillance order obtained by the federal government. Report on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications, January 1, 1974 to December 31, 1974, Administrative Office of the United States Courts, Table 4, p. X.

nation that probable cause is lacking, if that determination is later held to be incorrect, is the suppression of evidence of wrongdoing that may be necessary for a conviction. Moreover, the evidence is to be suppressed even though the interception was in all other respects lawful and the conversations can permissibly be used as evidence against the other participants therein.

In contrast, the statute requires only the identification of a single "person, if known, committing the offense, and whose communications are to be intercepted" (18 U.S.C. 2518(1)(b)(iv))—here, Curreri.[13] The decision below thus distorts the language of the statute in a way that will strongly encourage the naming in applications for interception orders of all persons who may eventually be overheard—at least wherever there is any possibility that some court will in the future determine that there was probable cause to believe such interception would occur. Even this approach is not without risk, however, for at least one court has suggested that the improper naming of a person in an interception order may justify the suppression of his intercepted conversations. *United*

[13] Moreover, the "if known" qualification suggests that actual knowledge, not probable cause, is the intended standard. Where the government has actual knowledge of the identity of the target of the electronic surveillance, but fails to identify anyone in the application and order, that omission would be a conscious disregard for the requirements of the statute and could be a violation warranting suppression. Cf. *United States* v. *Eastman*, 465 F.2d 1057, 1062 (C.A. 3); *United States* v. *Wolk*, 466 F.2d 1143, 1146 (C.A. 8).

States v. *Tortorello*, 480 F.2d 764, 775-776 (C.A. 2), certiorari denied, 414 U.S. 866.[14]

3. Not only will the principle espoused in the decision below create grave practical problems in the administration of the law governing wire interceptions, but it will serve no significant compensating policy objectives.

(a) It is far from clear that identification in doubtful cases is a desirable policy, even from the point of view of those who will be named. Being named in an application and order may subject an individual to adverse publicity when the order is unsealed, see *United States* v. *Kahn*, *supra*, 415 U.S. at 153.[15]

(b) The naming requirement of Sections 2518(1)(b)(iv) cannot reasonably be read as designed to protect the privacy of persons whose conversations may be intercepted, since it is equally proper to intercept the illegal conversations either of persons named in the order or of persons who were not named because they were not known to be using the target

[14] Nor is it clear what, if any, consequences would result from a judge's failure or refusal to name in the order a person identified in the application.

[15] As the court below notes, naming an individual in the application and the order does mean that he will receive formal notice that his conversations were intercepted (App. A, *infra*, p. 9a). But even unnamed persons must be notified if the judge determines that the interests of justice require it (18 U.S.C. 2518(8)(d)). In any event, once the named target of the interception is notified, it is unlikely that his co-conspirators will long remain ignorant of the interception.

phones for illegal purposes (*United States* v. *Kahn*, *supra*, 415 U.S. at 152-153). Instead, Congress protected the right of privacy of all those using the target phones by providing that the interception of innocent conversations must be minimized (18 U.S.C. 2518(5)).

No rational policy is served by suppressing only the conversations of those concerning whom there is some pre-existing evidence of illegal use of the target phones; the privacy interests of such persons are entitled to no greater protection than those of persons who are not known to be using the target phones illegally. Indeed, as the district court noted, such a result penalizes the government for careful pre-authorization investigation (App. E, *infra*, p. 45a, n. 2).

(c) The court of appeals identified three purposes to be served by the statutory identification provisions: (i) adequate executive review of electronic surveillance applications; (ii) informed judicial control over the use of electronic surveillance; and (iii) comprehensive judicial review of such surveillance (App. A, *infra*, pp. 7a-11a). But none of these purposes is directly or substantially promoted by requiring the identification of persons who are not the principal target of the investigation. Cf. *United States* v. *Giordano*, *supra*, 416 U.S. at 527.

(i) It is highly unlikely that the Attorney General or the specially designated Assistant Attorney General will be familiar with the names included in proposed wire interception applications. Even in the

few cases in which the names would be recognized, the authorizing official will be properly concerned not with the identities of those involved, but with the seriousness of the offense, the existence of probable cause, and the necessity for the use of electronic surveillance. Here, for example, the application and affidavit for the original and the extension orders each adequately informed the authorizing officer of these considerations; it cannot seriously be contended that information concerning Bernstein's suspected participation in any way affected the decision to authorize the original application or that further knowledge of his participation would have affected the decision to apply for an extension of that order.

(ii) The congressional intent to have the issuing judge provided with any prior history of electronic surveillance of the named persons is adequately protected where the principal target of a proposed interception is named, as was the case here. Prior electronic surveillance of persons who might incidentally be overheard conversing with the named target would ordinarily be of no substantial interest to the judge reviewing the application.[16]

---

[16] Of course, in a case where the government omitted from the application, intentionally and with the intent to deceive the issuing judge, the identity of a person who was the real target, so that the government would not have to list prior interception history of that person, suppression might be appropriate. Cf. *United States* v. *Bellosi*, 501 F.2d 833 (C.A. D.C.). In the instant case, Bernstein's identity was not omitted for any improper purpose.

(iii) Subsequent judicial review of wire interceptions is guaranteed fully by the identification of the targets of the interception, who must receive statutory inventory notice. 18 U.S.C. 2518(8)(d). Indeed, the purpose of the notice is to make sure that "all authorized interceptions must eventually become known at least to the subject." S. Rep. No. 1097, 90th Cong., 2d Sess., p. 105 (1968). In the instant case, the persons named in the order received the inventory notice required by the statute (C.A. App. 148); respondent, who was not named, received sufficient actual notice to permit him to litigate his motions to suppress. It is hardly likely that the fact that he was not named in the order significantly delayed his realization that his conversations had been intercepted (see note 14, *supra*).

4. The court below relied on a dictum in *United States* v. *Kahn*, *supra*, 415 U.S. at 155, in concluding that probable cause is the standard to be applied in determining whether the government must identify a person whose conversations may be overheard. But in *Kahn* the issue was whether identification was necessary in the absence of knowledge of the individual's participation in the illegal activity. This Court concluded that it was not. The dictum upon which the court below relied, taken in context, indicates no more than that in the *absence* of probable cause to believe that a person is involved in the illegal activity, there is no need to identify him. It by no means follows that all persons as to whom there *is* probable cause must be identified; that question was

simply not before the Court in *Kahn*. It is presented for the first time here.

5. The court below also misapplied *United States* v. *Giordano*, 416 U.S. 505, in concluding that the identification requirement was a "statutory precondition to a valid intercept order, and failure to identify renders an interception contrary to law and invalid as to that person" (App. A, *infra*, p. 11a). For the reasons noted above, we believe the court erred in concluding that the statute requires the identification of all those who the government has probable cause to believe will participate in conversations over the target phone for the identified illegal purpose. But even assuming, *arguendo*, that our interpretation is incorrect, the identification requirement is hardly a provision the violation of which warrants suppression.

Giordano and *United States* v. *Chavez*, 416 U.S. 562, teach that suppression is required only when the provision violated is one which "directly and substantially implement[s] the congressional intention to limit the use of intercept procedures to those situations clearly calling for [them]," *Giordano*, *supra*, 416 U.S. at 527.

In contrast to *Giordano*, there is no suggestion here that the interception was itself improper. The failure to identify respondent clearly had no effect either on the decision to issue the intercept order or on effective judicial review of its implementation. Nor could such a failure reasonably be expected to have such an effect in future cases (see *supra*, pp. 15-17).

It is particularly evident that the violation, if any, is merely technical where, as here, the suppressed conversations are with the named target. In such a case, the government has an unquestioned right, by virtue of the intercept order, to overhear the conversation;[17] thus, no substantial rights of the unidentified participant have been violated, and suppression is wholly inappropriate. Cf. *United States* v. *Chavez*, *supra*; *Smith* v. *United States*, 360 U.S. 1, 9.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.

JOHN C. KEENEY,
Acting Assistant Attorney General.

HARRIET S. SHAPIRO,
Assistant to the Solicitor General.

JEROME M. FEIT,
MARC PHILIP RICHMAN,
Attorneys.

MAY 1975.

[17] If the government had listened to these conversations after receiving Curreri's permission to overhear them, Bernstein could not have complained, 18 U.S.C. 2511(2)(d); *United States* v. *White*, 401 U.S. 745; *Hoffa* v. *United States*, 385 U.S. 293. Bernstein's grounds for complaining about the invasion of his privacy are even weaker here, where the government had the authorization of a district court to overhear Curreri's conversations.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1066

UNITED STATES OF AMERICA, APPELLANT

—*v*—

CALMAN BERNSTEIN, APPELLEE

Appeal from the United States District Court for the District of Maryland, at Baltimore. C. Stanley Blair, District Judge.

(Argued September 30, 1974
Decided January 24, 1975)

Before CRAVEN, BUTZNER, and FIELD, Circuit Judges.

BUTZNER, Circuit Judge:

The United States appeals from a district court order that suppressed Calman Bernstein's intercepted

phone calls as evidence against him. The court found that when the government applied for the intercept order extensions, under which the conversations were later seized, its agents knew that Bernstein was committing the crime under investigation and would use the telephone they sought to tap. Because Bernstein was not identified in either the applications or the extensions, in violation of Title III of the Omnibus Crime Control and Safe Streets Act, the court suppressed the conversations. Its opinions are reported as United States v. Curreri, 368 F.Supp. 757 (D. Md. 1973), and United States v. Bleau, 363 F.Supp. 438 (D. Md. 1973).

The wiretaps were part of an investigation of numbers bookmaking. The first intercept order was obtained on March 30, 1972, and extensions were granted on April 14, May 1, and May 17. After Bernstein and others were indicted for conducting an illegal gambling business, he moved to suppress conversations seized under both the original order and the extensions. The district court found that although government agents had probable cause to believe that Bernstein was involved in the business before they applied for the March 30 order, they did not know that he would use the tapped telephones. Consequently, it denied Bernstein's motion to suppress the conversations obtained by the first interception. Bernstein has not appealed this order.

The court then found that before the agents applied for the April 14 extension order, information from the first interception had given them probable

cause to believe that Bernstein would be overheard on a tapped telephone. Their failure to identify him in that and subsequent applications, it held, rendered the interceptions obtained after April 14 unlawful with respect to him. Accordingly, the court suppressed them. We affirm.

I

The application for a wiretap order must include "a full and complete statement of the facts and circumstances relied on by the applicant to justify his belief that an order should be issued, including . . . the identity of the person, if known, committing the offense and whose communications are to be intercepted." [1] Extensions of an intercept order require

---

[1] 18 U.S.C. § 2518 provides:

"(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

. . .

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted. . . ."

a new application containing the same information needed for the original one.[2] The order must specify "the identity of the person, if known, whose communications are to be intercepted."[3] Since it is only through the application that the judge learns the identity of the person whose conversations are to be intercepted, the identification requirement for the order is no broader than for the application. United States v. Kahn, 415 U.S. 143, 152 (1974). The critical issue in this case, therefore, is whether the omission from a wiretap application of the name of a known offender whose communications are to be overheard dictates suppressing his conversations as unlawfully intercepted when the government proposes to use them against him.[4]

---

[2] 18 U.S.C. § 2518(5) provides in pertinent part:

". . . Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section . . ."

[3] 18 U.S.C. § 2518(4)(a).

[4] 18 U.S.C. § 2518(10)(a) provides:

"Any aggrieved person in any trial . . . in or before any court . . . of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted.

. . . .

If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter."

[Footnote continued on page 5a]

Not every violation of Title III results in an unlawful interception. A violation is material only if Congress intended the statutory provision that was not followed to be "a precondition to obtaining . . . intercept authority." United States v. Giordano, 416 U.S. 505, 515 (1974).[5] Statutory preconditions, teaches the Court, "directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." 416 U.S. at 527. In contrast, violation of a statutory provision that does not "affect the fulfillment of any of the reviewing or approval functions required by Congress," does not render an interception unlawful within the meaning of § 2518(10)(a)(i). United States v. Chavez, 416 U.S. 562, 575 (1974).[6] Whether a statutory provision is a

---

[4] [Continued]

18 U.S.C. § 2515 provides:

"Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received . . . in any trial . . . if the disclosure of that information would be in violaton of this chapter."

18 U.S.C. § 2517(3) allows intercepted communications to be used as evidence only if obtained "by any means authorized by this chapter."

[5] In *Giordano* the Court affirmed suppression because the Attorney General or a designated Assistant Attorney General failed to review and approve the application for an intercept order, in violation of 18 U.S.C. § 2516(1).

[6] *Chavez* held that application's misnomer of the authorizing Assistant Attorney General, in violation of 18 U.S.C. § 2518(1)(a), did not require suppression.

precondition to a valid order depends, then, on its role in the Act's system of restraints on electronic surveillance.

Title III was drafted to protect the privacy of wire and oral communications while allowing the use of electronic surveillance in the investigation of certain crimes. It restricts eavesdropping by law enforcement officers to conform to the fourth amendment and to prevent abuse even of constitutional surveillance. The government contends that the identification requirement serves neither end and that its violation is a mere technical omission. But when the entire statute is considered, identification is seen to facilitate both constitutional and congressional limits on eavesdropping.

Electronic interception of communication is a form of search and seizure subject to the fourth amendment. Unless a party to the conversation consents, the amendment only permits interceptions with prior judicial approval to gather information about a specific crime for a limited time from a particular place. Therefore, the amendment prohibits eavesdropping to collect general intelligence about individuals. *See generally* United States v. United States District Court, 407 U.S. 297 (1972); Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41 (1967). Several provisions of Title III directly implement these restrictions.[7] Though dic-

[7] *E.g.*, 18 U.S.C. §§ 2518(3) (judicial finding of probable cause that evidence of specific crime can be gathered from specific place), 2518(5) (limitations on time and scope).

tum in United States v. Kahn, 415 U.S. 143, 155 n.15 (1974), indicates that the fourth amendment might not require naming a known offender whose conversations are to be intercepted,[8] identification nevertheless fosters conformity with both constitutional and statutory requirements. In particular, it is important to the exercise of (A) executive approval, (B) prior judicial authorization, and (C) subsequent judicial review of interceptions.

A

In order to allow only necessary electronic surveillance, Congress imposed preconditions not required by the Constitution, including restriction of federal authority to request intercept orders to the Attorney General or a designated Assistant Atorney General. 18 U.S.C. § 2516(1); Unied States v. Giordano, 416 U.S. 505 (1974). When deciding whether to approve surveillance, however, the Attorney General depends on information from law enforcement officials. If his subordinates do not identify known persons whose conversations they wish to intercept, they effectively substitute their judgment for his. It is therefore

[8] *But see* West v. Cabell, 153 U.S. 78 (1894). This case, cited in the legislative history of § 2518(4)(a), S. Rep. 1097, 90th Cong., 2d Sess., 1968 U.S. Code Cong. and Admin. News 2191, held that both the common law and the fourth amendment required that the person to be seized under an *arrest* warrant should be accurately named. Since the other information demanded in § 2518(1)(b) is required by the fourth amendment, Congress may have believed that identification of the person speaking is also constitutionally required.

apparent that identification, as required by § 2518(1)(b)(iv), is essential to the discharge of responsibility which the Act places on the Attorney General or his designate.[9]

B

Both the fourth amendment and Title III require prior judicial authorization of electronic eavesdropping in order to forestall abuses by enforcement officials. 18 U.S.C. §§ 2511, 2518(3); United States v. United States District Court, 407 U.S. 297 (1972); Katz v. United States, 389 U.S. 347 (1967). Issuing an intercept order is not simply a ministerial act, for the judge must decide that the constitutional and statutory justifications for the intrusion exist. So that the judge can be as informed as possible in an *ex parte* hearing, Congress required the applicant for an intercept order to furnish the necessary facts in considerable detail. *See* 18 U.S.C. § 2518(1); *cf.* Spinelli v. United States, 393 U.S. 410 (1969).

Included in the information the government must furnish is a complete history of the electronic surveillance of the persons named in the application.[10]

[9] The fact that an application for an extension is involved in this case is not significant. The Acting Attorney General separately authorized the April 14th extension and, on the recommendation of an Assistant Attorney General, approved the addition of names not included in the original application. Bernstein's name, however, was not mentioned.

[10] 18 U.S.C. § 2518(1)(e) requires:

> "A full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application. . . ."

Omission of this information is a statutory violation that invalidates any interceptions with respect to the persons not listed. United States v. Bellosi, 501 F.2d 833 (D.C. Cir. 1974). As that case explains, Congress believed that information about prior surveillance is "necessary to judicial consideration of whether the proposed intrusion on privacy is justified by important crime control needs." 501 F.2d at 837. But a history of prior taps involving the same person is available to the court only when he is named in the application. Identification required by the Act, therefore, facilitates judicial control by providing the complete history that Congress deemed necessary for an informed decision.

C

In Berger v. New York, 388 U.S. 41, 60 (1967), the Supreme Court held that notice of a search is an essential element of judicial control over the execution of intercept orders. Secrecy, it reasoned, could make vindication of fourth amendment rights impossible, especially when the government did not intend to use the intercepted conversations as evidence. Conforming to the Constitution, Title III requires service of notice on "the persons named in that order or the application, and such other parties to inter-

cepted communications as the judge may determine," informing them that an interception was applied for and either denied or carried out. 18 U.S.C. § 2518(8)(d). This notice, the legislative history explains, "should insure the community that the techniques are reasonably employed. Through its operation all authorized interceptions must eventually become known *at least to the subject.* He can then seek appropriate civil redress . . . if he feels that his privacy has been unlawfully invaded." [Italics added.] S. Rep. 1097, 90th Cong., 2d Sess., 1968 U.S. Code Cong. and Admin. News 2194.[11]

Unless the government uses the intercepts as evidence against him, an unnamed subject has no assurance that he will receive notice, and the government may secretly circulate unlawfully intercepted conversations to other law enforcement agencies and use them in its own operations.[12] Post-interception judicial review in an adversary hearing, an essential part of Title III's remedial scheme, cannot be had without notice to the person overheard. When the government expects to listen to a known offender, it has the statutory duty to name him in the application so that he will receive the notice to which he is entitled. Failure to do so can obstruct judicial review

[11] 18 U.S.C. § 2520 provides a civil remedy for violations of Title III.

[12] If the intercepts are used as evidence, the government must give notice at least ten days before trial. 18 U.S.C. § 2518(9).

of the government's actions and thwart the congressional policy of protecting the individual's privacy.

In conclusion, the Act's identification requirements form an integral part of the system Congress created to protect privacy by executive and judicial control of electronic surveillance. Identification of known persons, as required by § 2518(1)(b)(iv), is therefore a statutory precondition to a valid intercept order, and failure to identify renders an interception contrary to law and invalid as to that person. 18 U.S.C. §§ 2518(10)(i), 2515; *cf.* United States v. Giordano, 416 U.S. 505 (1974).

II

We next consider whether Bernstein was "known" within the meaning of § 2518(1)(b)(iv), which requires the application for an intercept order to include "the identity of the person, if known, committing the offense and whose communications are to be intercepted." The problem consists of three parts: what information does the statute require; how certain must the applicant be about this information; and whether the district court correctly assessed the applicants' knowledge when they applied for the April 14th extension.

We agree with the district court that § 2518(1)(b)(iv) imposes no duty of identification until the applicant knows both that the individual "is committing the offense" and that his "communications are to be intercepted." The Supreme Court settled

the first point in United States v. Kahn, 415 U.S. 143, 156-7 (1974). Its opinion supports the second by implication, for if the government has no knowledge that a certain person will be overheard on the tapped phone, it cannot intend to invade his privacy and would serve no statutory purpose by identifying him. *See* United States v. Martinez, 498 F.2d 464, 468 (6th Cir. 1974).

How positive of the relevant facts must the government's agents be? The government maintains that it must name the person only when its knowledge approaches certainty. Bernstein contends that the government must identify the subject of an interception when its knowledge supports a finding of probable cause of his criminal activities and use of the phone to be tapped.

Again, *Kahn* provides guidance by indicating that probable cause is sufficient knowledge.[13] The Court's observation, though dictum, is consistent with the historical use of this test to evaluate other invasions of privacy. *See, e.g.*, Almeida-Sanchez v. United States, 413 U.S. 266 (1973). Sibron v. New York, 392 U.S. 40 (1968). The probable cause standard is a well tried compromise between the interests of per-

[13] In United States v. Kahn, 415 U.S. 143, 155 (1974), the Court stated that:

> "Title III requires the naming of a person in the application or interception order only when the law enforcement authorities have probable cause to believe that that individual is 'committing the offense' for which the wiretap is sought."

sonal privacy and effective law enforcement. *See* Brinegar v. United States, 338 U.S. 160, 176 (1949). Examination of the evidence by a neutral, objective judicial officer provides a more uniform and certain measure of the investigator's knowledge than his own subjective judgment. *See* Johnson v. United States, 333 U.S. 10, 13-14 (1948). We therefore hold that when there is probable cause to believe that an individual is committing a specific crime and may be overheard on a specific phone, he is known to the government for the purpose of § 2518(1)(b)(iv).

We next consider whether the district court correctly found that the F.B.I. had probable cause to believe Bernstein was participating in the activity under investigation and would use a phone covered by the extension of the intercept order. Since the district judge's opinion sets forth the facts in meticulous detail, only a brief resume of the evidence is necessary for our purposes. *See* United States v. Curreri, 368 F.Supp. 757, 761 (D. Md. 1973).

Before the government applied for its initial intercept order on March 30, F.B.I. agents investigating Robert Curreri, a bookmaker whose telephones they wished to tap, learned from two informants of proven reliability that Bernstein was handling Curreri's layoff.[14] Baltimore police also told agents that

[14] A bookmaker must diminish his risks by re-betting, or "laying off," large bets with another bookmaker. The person who takes layoff bets is an integral part of a bookmaking business. United States v. Bobo, 477 F.2d 974, 990 (4th Cir. 1973).

Bernstein was reputedly involved in gambling. It is apparent the district court correctly found that from this information the agents had probable cause to believe Bernstein was part of an illegal gambling business. Indeed, the government now concedes this point.[15] But not until Curreri's phones were actually tapped did the F.B.I. learn that Bernstein would use one of them to discuss gambling with Curreri. On April 11, 1972, agents monitored a call on one of Curreri's phones from a man whom they were able to identify as Bernstein. Initially, an unidentified man told Bernstein that Curreri was busy. When Bernstein gave his name and said that he had a message to call, he was told to hold on because Curreri wanted to speak to him. Curreri and Bernstein then discussed a payoff on a wrong number the previous day and ways to avoid the same mistake in the future. During the conversation Bernstein said that he had told his girl to "call everybody" when he had learned of the mistake and that he had called Curreri's mother once before about a similar problem. Curreri then instructed Bernstein to give his girl Curreri's number, saying, "I'm either here or home or someplace." Bernstein reassured Curreri that anytime a wrong number was reported, "If it's four o'clock in the morning, I'll call." The transcript ends with Bernstein saying, "I'll talk to you later," and

[15] "There is no question but that the government had probable cause to believe that Bernstein was a member of Curreri's gambling operation . . ." Reply Brief for the United States 5.

Curreri responding, "O.K., Cal." The government mentioned neither Bernstein nor this call in its April 14th application.

Taken as a whole, the evidence supports the district court's finding. F.B.I. agents already had probable cause to believe Bernstein was involved in Curreri's operation. The April 11th conversation, which referred to payments between the two men, confirmed this and also showed that Bernstein phoned Curreri. A detached observer could conclude from the evidence available before April 14 that the government had probable cause to believe that Bernstein was still handling Curreri's layoff and on occasion would talk with him about the business on a tapped phone. *Cf.* United States v. Kleve, 465 F.2d 187, 193 (8th Cir. 1972).

III

The government contends that even if it violated § 2518(1)(b)(iv) with respect to Bernstein, § 2517(3) authorizes the use of the taps as evidence against him.[16] Briefly, the government argues that the communications between Bernstein and Curreri include

[16] 18 U.S.C. § 2517(3) provides:

> "Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any criminal proceeding in any court of the United States or of any State or in any Federal or State grand jury proceeding."

both sides of the conversation; that a valid order covered Curreri; and that once lawfully intercepted, Bernstein's conversations could be used against anyone, including Bernstein himself.

The fundamental error in the government's position is the assumption that Title III provides only a right not to have the unlawful intercepts used in court. But Title III does more: it creates a right not to be overheard except in conformity with its provisions. 18 U.S.C. § 2511(1).[17] As we held in part I of this opinion, the identification required by § 2518(1)(b)(iv) is a precondition to lawful interception with respect to a known person. Therefore, contrary to the government's assertion, § 2517(3) supplies no basis for admission since by its terms it applies only to "communications intercepted in accordance with this chapter."

The government compares this case, however, to one where an independent ground for a search, such as a valid arrest, renders a defective warrant, or the absence of a warrant, immaterial. We find the analogy unpersuasive. A warrantless search incident to a lawful arrest is valid because the occasion requires the contemporaneous removal of weapons or dispos-

---

[17] 18 U.S.C. § 2511(1) provides in pertinent part:

"(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication . . . ."

shall be subject to criminal penalties.

able evidence from the prisoner and the area under his immediate control. United States v. Robinson, 414 U.S. 218 (1973). Similar exigent circumstances are lacking when agents tap a phone with probable cause to believe that they will overhear a particular person talking about specific criminal activity.

Nor can the government rely on a comparison to the plain view doctrine. The seizure of evidence in plain view is justified only when discovery is inadvertent. Coolidge v. New Hampshire, 403 U.S. 443, 469 (1971). The government's position finds no support in United States v. Kahn, 415 U.S. 143 (1974). Mrs. Kahn's conversations were lawfully intercepted because the government had no reason to suspect her criminal activities when the agents overheard her. Here, in contrast, the agents had reason to anticipate Bernstein's use of a tapped phone to discuss his participation in the crime they were investigating, and they intended to intercept his calls. The conversations suppressed by the district court were not inadvertently discovered.

We conclude, therefore, that when the government has the statutory duty to identify an individual, its failure to do so is not excused by the fact that it lawfully eavesdropped on another party to the conversation.

IV

Bernstein did not receive statutory notice of the wiretaps in which his conversations were intercepted. The government argues that because he later re-

ceived actual notice he was not prejudiced, and consequently his conversations are admissible.

Suppression, however, does not depend on proof of prejudice from lack of statutory notice. Congress defined an aggrieved person as "a party to any intercepted wire or oral communication or a person against whom the interception was directed." [18] Prejudice is not an element of the definition. Furthermore, the statute gives the district court no discretion to deny, because of lack of prejudice, an aggrieved person's motion to suppress when the interception is unlawful.[19] We conclude from the unequivocal language of Title III that Congress intended any unlawful invasion of an aggrieved person's privacy to be sufficient harm in itself to require suppression. *Cf.* United States v. Giordano, 416 U.S. 505, 524-29 (1974).

The order of the district court is affirmed.

---

[18] 18 U.S.C. § 2510(11).

[19] See footnote 4 *supra.*

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 74-1066

[Filed Jan. 24, 1975, William K. Slate, II, Clerk]

UNITED STATES OF AMERICA, APPELLANT,

vs.

CALMAN BERNSTEIN, APPELLEE.

Appeal from the United States District Court for the District of Maryland.

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ William K. Slate, II
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1066

[Filed Mar. 28, 1975, William K. Slate, II, Clerk]

UNITED STATES OF AMERICA, APPELLANT

versus

CALMAN BERNSTEIN, APPELLEE

ORDER

Upon consideration of the petition for rehearing and suggestion for rehearing en banc, by counsel,

It is, therefore, ORDERED, That the petition for rehearing and the suggestion for rehearing en banc be and it is hereby denied.

For the Court—By Direction.

/s/ William K. Slate, II
Clerk

[SEAL]

A True Copy, Teste:
WILLIAM K. SLATE, II, Clerk

By /s/ F. Chlorie
Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
D. MARYLAND

Crim. No. 72-0434

UNITED STATES OF AMERICA

v.

PATRICIA ANN BLEAU ET AL.

July 11, 1973

* * * *

MEMORANDUM AND ORDER

BLAIR, District Judge.

Calman Bernstein, a defendant in this prosecution under 18 U.S.C. § 1955 for alleged gambling activities, has moved for the suppression of wiretap evidence obtained under an authorization order entered on April 14, 1972. Bernstein claims that, at the time the April 14 order was obtained, the government knew of his alleged involvement in the gambling activities and use of the communication facilities to be monitored and, for this reason, his name was required to be listed in the application seeking and the order authorizing the wiretap. Since it was not, he argues, suppression of all evidence against him secured through the use of the April 14 wiretap must occur.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (hereafter Title III), 18 U.S.C. § 2510 et seq., imposes a qualified requirement that a party whose conversations are to be intercepted be named in the application and order. Section 2518 (1)(b)(iv) requires a listing in the wiretap application of "the identity of the person, if known, committing the offense and whose communications are to be intercepted." Section 2518(4)(a) similarly requires that the authorization order list "the identity of the person, if known, whose communications are to be intercepted." These provisions, among others, are designed to insure that the authorizing judge's order —i. e., the warrant—will be adequately particularized according to Fourth Amendment standards as enunciated in Berger v. New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967) and Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). *See*, Senate Report No. 1097, 1968 U.S.Code Congressional and Administrative News, 2112, 2189-90. They are also keyed to Title III's notice provisions—an integral part of the statute—in that those named in the order receive an inventory as a matter of right while others whose communications are intercepted in the course of the wiretap receive an inventory only in the discretion of the authorizing judge. 18 U.S.C. § 2518(8)(d).

[1-3] The listing in the warrant of the name of the owner of the premises to be searched or the things to be seized is not specifically required by the Fourth Amendment, which provides that "no Warrants shall issue, but upon . . . particularly describing the place to be searched, and the person or things to be seized." Hanger v. United States, 398 F.2d 91, 99 (8th Cir. 1968), cert. denied, 393 U.S. 1119, 89 S.Ct. 995, 22 L.Ed.2d 124 (1969); Miller v. Sigler, 353 F.2d 424, 428 (8th Cir. 1965), cert. denied, 384 U.S. 980, 86 S.Ct. 1879, 16 L.Ed.2d 690 (1966); Dixon v. United States, 211 F.2d 547, 549 (5th Cir. 1954); United States v. McClard, 333 F.Supp. 158, 163 (E.D.Ark. 1971), aff'd, 462 F.2d 488 (8th Cir. 1972); United States v. Ortiz, 311 F.Supp. 880, 883 (D.C.Colo. 1970), aff'd, 445 F.2d 1100 (10th Cir. 1971), cert. denied, 404 U.S. 993, 92 S.Ct. 541, 30 L.Ed.2d 545 (1971). All that need be particularly described for Fourth Amendment compliance is the place to be searched and the thing or person to be seized.[1] *See* Berger v. New York, 388 U.S. 41, 58-59, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967), where failure to particularize in this respect invalidated the New York statute despite the statute's requirement that the speaker be named whose conversations were to be intercepted. In regard to telephone communi-

[1] Property not actually described in the search warrant may still be seized if reasonably related to the purpose of the search. Taylor v. State of Minnesota, 466 F.2d 1119, 1121 (8th Cir. 1972); Louie v. United States, 426 F.2d 1398-1402 (5th Cir. 1970), cert. denied, 400 U.S. 918, 91 S.Ct. 180, 27 L.Ed.2d 158 (1970). *Contra*, if the officers obtaining the warrant knew of the property's existence, intended to seize it, but failed to have it listed on the warrant. Coolidge v. New Hampshire, 403 U.S. 443, 470-471. 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); United States v. Carney, 356 F.Supp. 855, 858 (M.D.Tenn. 1973).

cations it thus appears that under the Fourth Amendment it is possible to seize particularly described conversations from a particularly described place without naming the speaker in the warrant. United States v. Fiorella, 468 F.2d 688, 691 (2d Cir. 1972); United States v. King, 335 F.Supp. 523, 538-540 (S.D.Cal. 1971); United States v. Perillo, 333 F. Supp. 914, 921 (D.Del. 1971); United States v. Sklaroff, 323 F.Supp. 296, 324-325 (S.D.Fla. 1971). Of course, naming the speaker further particularizes the description of the conversations to be seized and would reinforce an otherwise detailed description of the conversation. *See, e. g.*, Katz v. United States, 389 U.S. 347, 354, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). To this end, in the effort to particularize to the greatest degree possible, Title III requires that the speaker be identified, but only upon a condition of reasonableness that the speaker be named "if known." On the other hand, if only by implication, if the speaker's identity is now known, conversations of the type and from the place particularly described can still be seized. Because the Fourth Amendment does not demand an owner's name be in a search warrant otherwise properly descriptive, a failure to name an individual could only be violative of Title III's requirements and not those of the Fourth Amendment. If suppression is proper, it would be the result of a failure to comply with Title III rather than the Fourth Amendment.

Since Title III requires the naming only of those who are known, it must be determined who fits into

the class of knowns, and who, in the unknowns. In United States v. Kahn, 471 F.2d 191 (7th Cir. 1972), cert. granted, 411 U.S. 980, 93 S.Ct. 2275, 36 L.Ed.2d 956 (1973), a decision defendant pillars his position upon, the Seventh Circuit tightly contracted the category of "unknowns." In that case, the government, under an order authorizing the tapping of gambling conversations between Irving Kahn and "others as yet unknown", intercepted gambling conversations between Irving Kahn and his wife, Minnie, whom the government did not know until that time was involved in her husband's illegal activities. Subsequently, two gambling calls between Minnie and known gambling figures were intercepted. The Seventh Circuit affirmed the suppression of Minnie Kahn's conversations on the ground that she did not fit into the class of persons "as yet unknown" and, not being named in the order, there was no authority to intercept her communications. The court stated that when the government can discover by a prudent investigation the names of all persons involved and whose conversations will be tapped, those persons must be named in the order if the government wants to tap their conversations. The court looked at the affidavit in the file in the wiretap proceeding and decided the government could have pursued other conventional avenues of investigation to determine Minnie Kahn's complicity in her husband's activities before submitting the wiretap application, but had not done so. The court noted that the government must demonstrate that other investigative techniques to discover

an unnamed person's identity had been tried and failed and that the government could not rely on the conclusionary statement in the application that "normal investigative methods reasonably appear to be unlikely to succeed and are too dangerous to be used" as an excuse or justification for not having known of Minnie Kahn's gambling activities and obtaining her name in the authorization order.

Judge Stevens dissented. He reasoned that Congress intended to permit conversations of persons unknown to the government at the time of the application for the wiretap order to be intercepted and that the order in this case so provided. Since nothing in the record indicated the government had knowledge of Minnie Kahn's involvement, she properly fit in the class of "unknowns." He felt the adequacy of the government's investigation was irrelevant to the requirement of listing names and pertained only to Section 2518(3)(c) which required the authorizing judge to make a finding that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." Since the authorizing judge had, in Judge Stevens' view, justifiably found that other means of investigation were inadequate or too dangerous, the government had to investigate by conventional means no further to intercept the conversations of people like Minnie Kahn, not known to the government at the time of the application.

[4, 5] Having considered both positions expressed in *Kahn*, this court is persuaded that Judge Stevens

is correct. Sections 2518(1)(c) and 2518(3)(c), and not Sections 2518(1)(b)(4) and 2518(4)(a), impose the exhaustion of conventional investigative techniques requirement on the government. These sections do not require the government to try and fail at every conceivable other avenue of investigation before a Title III wiretap can be obtained. United States v. Lanza, 356 F.Supp. 27, 30 (M.D.Fla. 1973). They permit a Title III interception if the authorizing judge finds other investigative techniques are either too dangerous to try or are unlikely to succeed if tried. *See, e. g.*, United States v. Bobo, 477 F.2d 974 et seq. (4th Cir. 1973), where the Fourth Circuit approved the authorization of a Title III wiretap upon the conclusion by the authorizing judge "that normal investigative procedures reasonably appear unlikely to succeed." If the authorizing judge finds one or the other, he can then approve the wiretap whether the government has the theoretical capability of using other investigative means or not. *See*, Senate Report No. 1097, 1968 U.S. Code Congressional and Administrative News, 2112, 2190. The majority opinion in *Kahn* ignores these sections of the statute and, in this court's mind, imposes a limit on the government not justified by the language of Title III or the Fourth Amendment.

[6] Before there is a need for the wiretap order to specifically list a person whose conversations are to be intercepted, the government must, at the time the order is applied for, have probable cause to believe that person is involved in the criminal activity

the wiretap seeks to monitor and is a user of the communication facility for that illegal purpose. Probable cause must exist for the government to know both the involvement and likely use, for one without the other does not mandate a naming in the order. Furthermore, the government must have probable cause to believe the involvement and use; mere suspicion is not sufficient. Otherwise, if probable cause did not exist to name the person in the application, there would not exist sufficient probable cause under Fourth Amendment standards to obtain a warrant against the named person, although this would not mean probable cause would not exist to intercept that person's conversation as a member of the class of "others not yet known." The statutory provisions requiring the authorizing judge to make specifically detailed probable cause findings support the conclusion that probable cause, and not suspicion, must exist as to both criminal involvement and use of the facility. *See* 18 U.S.C. § 2518(3). Consequently, if the government, at the time the application is made, has probable cause to "know" the person, the application and order under the terms of Title III must name that person or suppression of that person's monitored conversations will be appropriate.[2]

---

[2] Violation of the statutory requirements by a deliberate failure to list the name of the individual whose conversations the government intends to monitor is directly analogus to a violation of the constitutional requirements by a deliberate failure to describe in a warrant the property the government intends to seize. In Coolidge v. New Hampshire 403 U.S.

[7] This requirement could put the government in the awkward and unfairly precarious position of having to choose whether to name the individual in the application when questionable probable cause exists and risk being turned down by the authorizing judge as to that person, or proceed to investigate under the authorization of "others yet unknown" and face a possible challenge that the individual should have been named in the order. For this reason, the court believes a strong and clear, and not questionable, showing of probable cause existing at the time of the application is needed to sustain a motion to suppress after the wiretap has concluded, such a showing being tantamount to demonstrating a conscious disregard for the dictates of Title III.[3]

443, 471, 91 S.Ct. 2022, 2040, 29 L.Ed.2d 564, the court stated,

> If the initial intrusion is bottomed upon a warrant that fails to mention a particular object, though the police know its location and intend to seize it, then there is a violation of the express constitutional requirements of "Warrants . . . particularly describing . . . [the] things to be seized." The initial intrusion may, of course, be legitimated not by a warrant but by one of the exceptions to the warrant requirement, such as hot pursuit or search incident to lawful arrest. But to extend the scope of such an intrusion to the seizure of objects—not contraband nor stolen nor dangerous in themselves—which the police know in advance they will find in plain view and intend to seize, would fly in the face of the basic rule that no amount of probable cause can justify a warrantless seizure.

[3] 18 U.S.C. § 2515 prohibits the use as evidence of intercepted communications "if the disclosure of the information would be in violation of this chapter." A knowing and de-

Defendant avers that he was under investigation by the government, which on March 30 had strong suspicions of his involvement. These suspicions, defendant claims, were verified by interceptions obtained through an interception authorized on March 30 and, with this knowledge, the government had a duty to secure his name in the order of April 14.

[8] At a prior hearing, the government represented by counsel that it did not have probable cause on April 14 to seek inclusion of the name of Calman Bernstein in the authorization order. It is the government's position that he was at this time still in the class of "others as yet unknown." No evidence or testimony was presented at this hearing and there exists no record to conclusively support or deny this representation, although defendant has proffered transcript of his calls intercepted under the March 30 order which he contends verified the government's prior investigatory suspicions. Nothing though has been offered to establish the existence of those prior investigatory suspicions. Absent an adequate record, the court cannot rule on the scope of the government's knowledge at the time of the application. Therefore, an evidentiary hearing on this point, in accordance with this opinion, shall be held at a date to be scheduled.

There remains pending a motion by defendant Berstein for the suppression of evidence seized at

---

liberate failure to follow the statute's clear procedure would be a violation of Title III.

the time of his arrest. Since this motion also rests on disputed facts, an evidentiary hearing is needed for its resolution. The court will hold an evidentiary hearing on this motion at the same time the evidentiary hearing regarding the government's prior knowledge is held.

APPENDIX E

UNITED STATES DISTRICT COURT
D. MARYLAND

Crim. Nos. 72-0433-B, 72-0434-B

UNITED STATES OF AMERICA

v.

ROBERT S. CURRERI ET AL.

UNITED STATES OF AMERICA

v.

PATRICIA BLEAU ET AL.
(Consolidated cases)

Dec. 11, 1973

* * * *

MEMORANDUM AND ORDER

BLAIR, District Judge.

Calman Bernstein, a defendant in this prosecution under 18 U.S.C. § 1955 for alleged gambling activities, moved to suppress evidence obtained under a wiretap authorization order entered on April 14, 1972. In addition, he moved to suppress evidence seized at the time of his arrest. Since both motions rested on disputed facts, this court held an evidentiary hearing to resolve the issues presented.

As a result of facts brought to light at the hearing, this court directed that the government make available all records in its possession that contained references to Mr. Bernstein, which the court would then examine *in camera*. After the examination, the court turned over these records to the defendant, with all extraneous material and material which would have disclosed confidential informants excised. Subsequent to his examination of these records, Mr. Bernstein filed a further motion to suppress, this one relating to the conversations intercepted under a wiretap authorization order entered on March 30, 1972, the first in a series of four. The facts now before the court as revealed by the evidence presented at the hearing and by the government's subsequent production of documents, permit final disposition of all three motions. The court will first address the two motions to suppress the wiretap evidence, and will subsequently address the motion to suppress the evidence seized at the time of Mr. Bernstein's arrest.

I.

[1] In a Memorandum Opinion dated July 11, 1973, United States v. Bleau et al., 363 F.Supp. 438 (D.Md. 1973), this court dealt with the legal issues applicable to Mr. Bernstein's first motion to suppress. In that opinion, this court noted that Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (hereafter Title III), 18 U.S.C. § 2510 et seq., imposes a qualified requirement that a party whose conversations are to be intercepted be named in the

application and order. Section 2518(1)(b)(iv) requires a listing in the wiretap application of "the identity of the person, if known, committing the offense and whose communications are to be intercepted." Section 2518(4)(a) similarly requires that the authorization order list "the identity of the person, if known, whose communications are to be intercepted." These provisions, among others, are designed to insure that the authorizing judge's order—i. e., the warrant—will be adequately particularized according to Fourth Amendment standards as enunciated in Berger v. New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967) and Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). *See* Senate Report No. 1097, 1968 U.S. Code Congressional and Administrative News, 2112, 2189-90. They are also keyed to Title III's notice provisions—an integral part of the statute—in that those named in the order receive an inventory as a matter of right while others whose communications are intercepted in the course of the wiretap receive an inventory only in the discretion of the authorizing judge. 18 U.S.C. § 2518(8)(d).

[2-4] The listing in the warrant of the name of the owner of the premises to be searched or the things to be seized is not specifically required by the Fourth Amendment, which provides that "no Warrants shall issue, but upon * * * particularly describing the place to be searched, and the person or things to be seized." Hanger v. United States, 398 F.2d 91, 99 (8th Cir. 1968), cert. denied, 393 U.S. 1119, 89 S.Ct. 995, 22

L.Ed.2d 124 (1969). All that needs be particularly described for Fourth Amendment compliance is the place to be searched and the thing or person to be seized. *See* Berger v. New York, 388 U.S. 41, 58-59, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967). In regard to telephone communications, it thus appears that the Fourth Amendment permits seizure of particularly described conversations from a particularly described place without naming the speaker in the warrant. United States v. Fiorella, 468 F.2d 688, 691 (2d Cir. 1972).

Congress, however, apparently determined that a higher degree of particularization was desirable and required in Title III that the speaker be identified, but only upon a condition of reasonableness that the speaker be named "if known." On the other hand, if only by implication, if the speaker's identity is not "known", conversations of the type and from the place particularly described can still be seized. Because the Fourth Amendment does not demand an owner's name be in a search warrant otherwise properly descriptive, a failure to name an individual could only be violative of Title III's requirements and not those of the Fourth Amendment. If suppression is proper, it would be the result of a failure to comply with Title III rather than the Fourth Amendment.

[5, 6] Since Title III requires the naming only of those who are "known", it must be determined who fits into the class of knowns, and who, in the unknowns. United States v. Kahn, 471 F.2d 191 (7th Cir. 1972), cert. granted, 411 U.S. 980, 93 S.Ct. 2275,

36 L.Ed.2d 956 (1973). In its Memorandum Opinion dated July 11, 1973, *supra*, this court outlined the standards it would require the government to adhere to in naming persons whose conversations were to be intercepted in wiretaps authorized under Title III. Briefly, the court therein held that "[b]efore there is a need for the wiretap order to specifically list a person whose conversations are to be intercepted, the government must, at the time the order is applied for, have probable cause to believe that person is involved in the criminal activity the wiretap seeks to monitor *and* is a user of the communication facility for that illegal purpose." Memorandum Opinion, *supra* at 6-7. (emphasis added). This court further stated that it believed "a strong and clear, and not questionable, showing of probable cause existing at the time of the application is needed to sustain a motion to suppress after the wiretap has concluded, such a showing being tantamount to demonstrating a conscious disregard for the dictates of Title III." *Id.* at 8.

Mr. Bernstern premised his first motion on his involvement in the gambling operation under investigation was "known" to the government as understood in Title III. If true, he contends, this would trigger the requirement that he be specifically named in the application as one whose conversations were to be intercepted. Since he was not so named, he argues, the government has violated the statutory requirement, and his seized conversations must be suppressed under 18 U.S.C. §§ 2515 and 2518(10)(a).

To resolve this issue, the court must examine in detail the information available to the government at the time of application for both wiretap orders.

The records of the Baltimore Office of the F. B. I. reveal that information was developed about Mr. Bernstein beginning in June 1971. At that time, files were opened in the names of "Cal Bernstein" and "Calman Bernstein" and were numbered with the prefix "182", indicating that Mr. Bernstein was suspected of illegal gambling activity (Motion Exhibit 2). Subsequently, on November 13, 1971, a confidential informant, described in these proceedings as Confidential Informant No. 2, advised a special agent of the F. B. I. that Mr. Bernstein was engaged in gambling activity and that a certain third person, identified to the special agent but unnamed here, "is handling the lay-off action of Cal Bernstein." Motion Exhibits 5, 6. One week later, on November 20, 1971, Informant No. 2 identified a person who "personally collects Cal Bernstein's lay-off action from Bernstein at his tavern, located in the Highlandtown section of Baltimore, Maryland." Motion Exhibit 5.

Two months later, on January 18, 1972, the special agent learned from Informant No. 2 that, as of that date, "Robert Curreri [whose telephones the government sought to tap in its applications of March 30 and April 14] was operating a large numbers gambling business and giving his lay-off to Cal Bernstein who, in turn, was laying off to" another person whom the informant identified. Motion Exhibits 3, 5. In the lower left corner of the report of this inter-

view there are typed together, for filing purposes, the names of Cal Bernstein and Robert Curreri. Motion Exhibit 3. In the lower right corner is the signature of another special agent who would eventually serve as affiant in the government's application for the wiretap order. Motion Exhibit 3. This special agent, who was in charge of this case, testified at the evidentiary hearing and acknowledged that Informant No. 2 was known to be reliable. He also said that he had been told by another informant that a man named "Cal" was active in the Baltimore gambling community. As a consequence of this latter information, the special agent, on February 28, 1972, visited the head of the Baltimore City Police Department Vice Squad, who identified "Cal" as Calman Bernstein and also informed the special agent that Mr. Bernstein was reputed to be engaged in gambling and that he believed that he was so engaged. *See also* Motion Exhibit 5.

On March 1, 1972 this special agent prepared an affidavit for electronic interception. Motion Exhibit 5. The affidavit, which identified Mr. Bernstein and Mr. Curreri by name, stated that there was probable cause to believe that they were then engaged together in an illegal gambling business; that the telephones at Ocean Pride Seafood, among others, were being used to carry out the illegal business; and that evidence against them might be obtained through interception of wire communications. Motion Exhibit 5 at 1, 2. On March 3, 1972, the proposed affidavit was submitted to the F. B. I. headquarters in Washington,

D. C., for review, in accordance with established procedure. Four days later, on March 7th, the Washington office advised its Baltimore office that, "[a] review of your affidavit indicates that the subjects are engaged in a gambling operation which appears to warrant Title III electronic surveillance coverage." Motion Exhibit 1. Headquarters requested, however, that, "[t]o corroborate information provided by informants, you should attempt to develop additional current information regarding . . . Calman Bernstein." *Id.* On March 8, 1972, the day after this message had been received, a special agent interviewed another confidential informant for the purpose of obtaining current information as to Mr. Curreri and Mr. Bernstein. This informant related that Mr. Curreri was then "active in the numbers field" and that he was "laying off to Cal Bernstein." Motion Exhibit 4.

Notwithstanding this latest information, which also tied Mr. Bernstein to the Curreri operation, the government chose not to name him in its application for the March 30 order. In the course of the subsequently authorized wiretap, the government intercepted two calls that related to Mr. Bernstein. In the first, on April 11, 1972, two men identified as "Bob" and "Cal" engaged in an extended discussion of the mechanics of the gambling operation. Motion Exhibit 7. The second, on April 12, contained a passing reference to Mr. Bernstein. Motion Exhibit 8.

In his original motion to suppress, Mr. Bernstein argued that the first gambling-related conversation

sufficiently involved Mr. Bernstein in the gambling operation to move him from the category of "others unknown" to that of "known" within the meaning of Title III, requiring that he be specifically named in the application as one whose conversations would be intercepted. In his second motion, he contends that, based on the facts as brought forth by the evidentiary hearing, the government, even prior to its interception of the first gambling-related call, had sufficient probable cause to know of his involvement in the gambling operation, thereby triggering the Title III requirement that he be specifically named in the application as one whose conversations were to be intercepted.

[7] The court will first address the later motion —which relates to suppression of the conversations intercepted in the course of the March 30, 1972 tap. In this motion, defendant seems to assume that a strong showing of a person's involvement in a gambling operation leads *a fortiori* to the conclusion that such person will use the telephones of his co-conspirators in furtherance of that illegal activity. The Fourth Circuit has held that one who accepts "lay offs" [1] from another can be an integral part of the gambling system, since the laying off of bets is necessary "to achieve the goal of balanced books essential to a bookmaking system without risk of loss."

[1] "When a betting person has more money bet on a participant then he wishes, he transfers all or a part of the bet to someone else. This is called laying off." United States v. Bobo, 477 F.2d 974 (1973) at 990 n.9.

United States v. Bobo, 477 F.2d 974, 990 (1973). Thus, this court agrees with defendant that the evidence available to the government at the time of the application amounted to probable cause to believe that Mr. Bernstein was involved in the illegal activity the wiretap sought to monitor. However, it is unable to agree that such showing of involvement, without more, establishes probable cause to believe that he will use the telephones of all others whose involvement in the scheme is also established. In so doing, defendant appears to slight the second prong of the two-pronged test for the need to specifically list a person in the wiretap order—probable cause to believe that he is a user of the facility. Both prongs must be satisfied by "a strong and clear, and not questionable, showing of probable cause." To argue that probable cause can be found from such facts alone is to equate probable cause with permissible inference and, in this court's view, does not satisfy the higher standard which Congress required.

To demonstrate the type of independent verification this court believes would supply the necessary probable cause, this court points to informant testimony as regards Mr. Curreri and "an individual known as Bernice." One informant of high reliability stated specifically that he knew that "an individual known as Bernice" would be "handling the telephone at Curreri's numbers office" for the illegal gambling operation then under investigation, Motion Exhibit 5 at 7, and she was listed in the wiretap order of March 30, 1972 as one whose conversations were to

be intercepted. Similarly, several informants asserted that they knew from personal observation that Mr. Curreri was a user of the Ocean Pride telephones for that illegal purpose, Motion Exhibit 5, and he too was listed in the order.

[8] In examining the record, the court finds no independent verification of the probability that Mr. Bernstein was a user of the telephones the government sought to monitor, save for the bald assertions to that effect contained in the government's March 3 affidavit that had been rejected by F. B. I. headquarters. As a result, this court finds that as of March 30, 1972, Calman Bernstein was not "known" to the government in a manner that required his listing under the provisions of Title III in the application and order for the March 30, 1972 wiretap, and his motion to suppress conversations intercepted in the course of that wiretap is hereby denied.

[9] Next, the court will address Mr. Bernstein's first motion to suppress—which related to suppression of the conversations intercepted in the course of the wiretap authorized on April 14, 1972. In the course of the discussion above, the court determined that information available to the government established "strong and clear" probable cause as to Mr. Bernstein's involvement in the gambling scheme under investigation. The question this court must now resolve is whether or not the information intercepted as a result of the March 30, 1972 wiretap order moved Mr. Bernstein from the category of "others unknown" to that of one "known", requiring his

specific listing in the April 14 wiretap application and order—in other words, whether or not the second prong of the two-pronged test was satisfied. To do so, the intercepted conversations would have to establish either actual use, or a strong probability of use, of the monitored telephones by Mr. Bernstein for the illegal activity the government was investigating.

As mentioned above, Mr. Bernstein in fact did use the monitored telephone on March 11, 1972 for that illegal purpose. Motion Exhibit 7. This conversation was noted in the F. B. I. monitoring logs, and the monitoring officers indicated at the hearing that on the day of the interception they discussed the conversation with the special agent who was in charge of the investigation and who, four days later, was the affiant in the April 14 application. Even though the caller was identified only as "Cal", this court is constrained to note that the information available to the government at the time of the intercept could lead to only one conclusion—that "Cal" was indeed Calman Bernstein. In fact, the testimony of the three special agents at the hearing lead the court to conclude that they had immediately assumed that "Cal" was Calman Bernstein. One agent testified that he was familiar with Calman Bernstein and had investigated him "for at least several months", and he understood immediately the significance of the call which had come from "Cal". Another agent stated that the three agents had "speculated" that they had inter-

cepted a gambling conversation between Mr. Bernstein and Mr. Curreri.

On the following day, April 12, 1972, another call involving "Cal" was intercepted. Motion Exhibit 8. The caller asked "Bob" for "Cal's telephone number." "Bob" replied, "Yea, I have it but I'm not supposed to give it out," and then suggested "You call him at the bar; the number is 732-9722." One of the special agents testified that he knew at the time of the intercept that Mr. Bernstein owned a bar, and knew its name and location. This call, too, was discussed by the special agents on the day of the intercept.

At this point, it might reasonably be asserted that the sheer mechanics of the tap would not enable the government to process the information quickly enough to utilize it in the application of April 14. In fact, the last conversation used in the application to justify extension of the tap was intercepted on April 10. Arguably, if it takes a day or two to transcribe the tape recordings, plus a day or two to prepare the application and the affidavits, plus a day or two for the authorizing judge to review the file, it would be unreasonable to require the government to act on material not physically available at the time of application. For this reason, the government could argue quite persuasively that the above-mentioned conversations intercepted on April 11 and April 12 in the course of the first wiretap, Motion Exhibits 7 and 8, were not available at the time of the second application for extension.

[10] While this court will assume without deciding that the latter conversation could not reasonably be considered in the application of April 14, it does not so find in the case of the conversation of April 11. This conversation of April 11 between Mr. Curreri and Mr. Bernstein supplied sufficient—i. e., "strong and clear"—probable cause for the government to believe that Mr. Bernstein would use the tapped telephones, satisfying the hitherto unsatisfied second prong of the naming requirement. Absolute assurance on the part of the government that the caller "Cal" was in fact Calman Bernstein is not required to show probable cause. After examining the record, the court finds that probable cause existed to believe that the caller was Calman Bernstein.

As a result, Mr. Bernstein was "known" within the meaning of Title III's naming requirement at the time of the April 14, 1972 application and his motion to suppress the conversations intercepted in the course of the tap authorized by the order of that date is hereby granted.[2]

---

[2] Viewed from other perspectives, the result which the court reaches here may appear anomalous. Had the government agents been less diligent in their investigation and therefore had less knowledge about the defendant he may not have been "known" to them. The interceptions then may have been serendipitously beneficial to the government. Or had the government sought and obtained originally an order permitting interception for 30 days instead of 15 days as it did —the monitored conversations now suppressed may have passed muster. From these considerations, it may appear that the government is penalized for diligence, prudence and restraint. The court's resolution of the issue, however, must

II.

The defendant has also moved to suppress evidence seized during the search of his person at the time of his arrest on August 30, 1972. On that date, the arresting officers, special agents of the F.B.I., acting pursuant to a valid arrest warrant, stopped Mr. Bernstein as he departed a Baltimore restaurant in midmorning and informed him that he was under arrest. Thereupon, as the agents recount it, they had the defendant lean against a parked automobile as one of the agents conducted a patdown for weapons. In the course of the patdown, the agent felt a firm lump in the right front pocket of the defendant, reached into the pocket, and pulled out a one-inch thick wad of bills and two three-by-five cards. Written on these cards were lists of names and figures.

Defendant seeks to suppress the introduction into evidence of these cards, alleging in his motion a violation of his Fifth Amendment privilege against self-incrimination and a violation of the Fourth Amendment proscription against unreasonable searches.

[11] This court will deal with the Fifth Amendment consideration first, since, in cases that assert both Fifth and Fourth Amendment violations, the Fifth Amendment issue should be resolved initially. Schmerber v. California, 384 U.S. 757, 767-768, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966); Hill v. Philpott, 445 F.2d 144, 148 (7th Cir. 1971).

---

come from an application of the law to the facts presented, anomalous consequences aside.

Defendant Bernstein, presumably on the grounds that the cards are testimonial or communicative in nature—the equivalent of private books and records at issue in Hill v. Philpott,[3] 445 F.2d 144 (7th Cir. 1971), cert. denied, 404 U.S. 991, 92 S.Ct. 533, 30 L.Ed.2d 5—claims that their introduction into evidence at trial would violate his Fifth Amendment privilege against self-incrimination. On the facts presented by this case, this court finds more persuasive the more recent Sixth Circuit case, United States v. Blank, 459 F.2d 383 (1972), cert. denied, 409 U.S. 887, 93 S.Ct. 111, 34 L.Ed.2d 143 (1972). In *Blank*, the evidence sought to be suppressed represented work sheets, allegedly in defendant's handwriting, of a sports and horse book betting business that were seized under an admittedly valid search warrant. The District Court had suppressed the evidence on Fifth Amendment grounds, and the Court of Appeals vacated the suppression order. The court based its decision on two primary facts, both applicable to the case at bar:

> 1) The subjects of the seizure are not personal communications at all but rather business accounts rendered extraordinary only by the fact that the business is itself illegal.

---

[3] Hill v. Philpott held that the defendant's Fifth Amendment privilege against self-incrimination had been violated by seizure of his private books and records, despite the fact that the materials had been seized pursuant to a search warrant valid under the Fourth Amendment.

2) These are not privately recorded and privately held thoughts or descriptions of events, as in the case of a closely held diary, but rather business records of which other persons must have knowledge. [footnote omitted].

* * * *

In summary, we feel that appellant was not "compelled" to produce these papers in violation of the Fifth Amendment; that the papers are not communicative in nature; that the papers are business records rather than personal and private writings; and that they are on their face instrumentalities of the crime with which appellant is charged. So viewed, they are subject to seizure under Fourth Amendment search warrant procedures and having been so seized, should not have been suppressed. United States v. Blank, 459 F.2d 383 at 386-387.

[12] In Mr. Bernstein's case, the two cards were seized in compliance with Fourth Amendment procedures as will be shown, *infra*; the seizures in no way involved compulsion within the meaning of the Fifth Amendment,[4] and the cards were the business records and instrumentalities of the illegal activity. For these reasons, this court denies defendant's motion,

---

[4] *See* United States v. Blank, 459 F.2d 383 (6 Cir.) at 385. The seizure incident to the arrest involved no compulsion to produce demanded information as would, for example, a subpoena. In other words, there was no demand for affirmative action. *See* Boyd v. *United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1885); Schmerber v. California, 384 U.S. 757, at 763-764, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).

based on Fifth Amendment grounds, to suppress the two cards seized by the government.

[13] The court now turns to the defendant's claim that the search itself offended the constitutional requirements of the Fourth Amendment. Searches incident to a lawful arrest, with or without a warrant, do not offend Fourth Amendment safeguards provided they are reasonable searches. Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). As the Supreme Court said in *Chimel*:

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. * * * In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.
>
> 395 U.S. at 762-763, 89 S.Ct. at 2040.

[14] The search incident to arrest in the case at bar complies with the standards enumerated in *Chimel*. The agent who searched the defendant testified that the patdown and search were protective—to determine if Mr. Bernstein, a former police officer, carried a weapon. This court is persuaded and accepts as a fact that the agent had a reasonable apprehension that the "hard lump" he felt in Mr. Bernstein's pocket might be a weapon. This provided sufficient cause for the agent to reach into Mr. Bernstein's pocket to remove the suspicious object. In so

doing, the incriminating evidence was inadvertently removed in the process. On this basis alone, the court would deny Mr. Bernstein's motion to suppress.

[15, 16] It must be noted, of course, that *Chimel* permits a much more extensive warrantless search of an arrestee than the simple search for weapons that the agents claimed to be conducting herein. A search for evidence incident to arrest would also be permitted as long as it was reasonable. The defendant, however, claims that a search incident to a lawful arrest can proceed beyond a protective patdown for weapons only if the arresting officer has probable cause to believe that destructible evidence of the crime will be found on the person.[5] Defendant cites several cases to support his theory, but none are on point. Each involved a search of the person following a warrantless arrest for a traffic offense, and it is clear to this court that a search of an offender's person for evidence of a traffic offense is, without more, manifestly unreasonable. The court is persuaded that even if the sole purpose of the search at the time of arrest

---

[5] It is not entirely settled that the search must be for evidence reasonably related to the crime for which the warrant issued. *See, e.g.*, United States v. Simpson, 453 F.2d 1028, 1030 (1972), cert. denied, 408 U.S. 925, 92 S.Ct. 2504, 33 L.Ed.2d 337 (1972), where the Tenth Circuit upheld the search of the arrestee's wallet and the seizure of evidence therein upon his lawful arrest on a dynamite charge. Nonetheless, the court is convinced that the search in this case, if it had been for evidence, would have borne a reasonable relationship to the crime for which the defendant was arrested. *See* United States v. Humphrey, 409 F.2d 1055 (10th Cir. 1969).

had been for evidence, it would nonetheless be a lawful search in this instance.

For the above-stated reasons, this court finds that defendant's motion to suppress the evidence on Fourth Amendment grounds must also be denied.

APPENDIX F

DM-7
Day 13 April 11, 1972
Reel #1

---

* * * *

Call #14 (Page 4) 5:17 p.m. Incoming call
Male #1: Unknown
Male #2: CAL
Male #3: BOB

DM-7
Day Number 13
Telephone Number 301—821-1741

#14 Incoming Call to 821-1741
at 5:17 p.m.

UNKNOWN Male #1: Ah he is busy right.

BERNSTEIN Male #2: All right, well I had a message to call him. Tell him that CAL called and ah . . .

UNKNOWN Male #1: Oh hold on CAL, I think he wants to talk to you.

BERNSTEIN Male #2: Okay.

UNKNOWN #1: CAL, he'll be with you in a minute.

BERNSTEIN #2: Okay, right.

CURRERI Male #3: Hello

BERNSTEIN Male #2: You okay.

CURRERI Male #3: Yeah, yes sir.

Yeah, what happened?

BERNSTEIN #3: What's that?

CURRERI #2: Yesterday.

BERNSTEIN #3: What do you mean what happened?

CURRERI #2: Nobody said nothing.

BERNSTEIN #3: Huh?

CURRERI #2: We didn't find out until noon today.

BERNSTEIN #3: Well, I didn't find out until, well you found out about quarter to 12 and I found out about 11:30.

CURRERI #2: Uh-uh-uh.

BERNSTEIN #3: You pay off. I hope you did. I hope you get stuck up your ass.

CURRERI #2: They all had it.

BERNSTEIN #3: Huh? All that's a lot of shit.

CURRERI #2: Well the guy is trying to go around, it's the, ah mostly his work not mine.

BERNSTEIN #3: I ah I can't even believe how anybody can try anything like that I mean, christ I don't know anybody that paid off. Nobody.

CURRERI #2: Well, I ah it was even, nobody said it was unofficial last night or any . . .

BERNSTEIN #3: It's never unofficial and it's never official.

CURRERI #2: Well the thing is like with these guys it ah you got a guy that's got a dollar or two dollars and he is gonna . . .

BERNSTEIN #3: I ah BOB, I got the same things. And I don't subtract it from the ribbon until after 1:00 the next day. I call them and give them a new balance, when service opens. And I believe I told you that before.

CURRERI #2: Well.

BERNSTEIN #3: And that's the only way to do it.

CURRERI #2: Well, it's just I ah gonna have to do that now. I guess Christ, I . . .

BERNSTEIN #3: Christ, you should've done it . . .

CURRERI #2: I had like $20 on that fucking thing.

BERNSTEIN #3: How much?

CURRERI #2: About 20.

BERNSTEIN #3: Oh, I had, I didn't have no where near that, but ah ah

CURRERI #2: Christ, one guy he had 5 75. Says he paid the whole

BERNSTEIN #3: Well, that's good.

CURRERI #2: Now he's got the other guy, he wants to go with him to try to get it back tonight.

BERNSTEIN #3: (laughing)

CURRERI #2: Yeah.

BERNSTEIN #3: Christ, I never paid one person off. Not one. Remember when I give you that money. I said hold off until the next day until we check it off.

CURRERI #2: Yeah.

BERNSTEIN #3: That's all, I do that all the time.

CURRERI #2: Well, another expensive lesson I guess.

BERNSTEIN #2: How in the hell did they fuck so bad with that shit though?

BERNSTEIN #3: I don't know the morning papers got the same mistake.

CURRERI #2: Uh-uh-uh.

BERNSTEIN #3: I mean they came over the wires, that's all. I'll tell you got another bad one today going.

CURRERI #2: That's all I need.

BERNSTEIN #3: A pair of aces in the lead.

CURRERI #2: That's nice.

BERNSTEIN #3: Yeah, I got a whole . . .

CURRERI #2: And yesterday I think I had ah whole quarter hit on 398.

BERNSTEIN #3: Yeah, I had ah

CURRERI #2: And here this way, I would with $20.

BERNSTEIN #3: Yeah, Well you are gonna have to wound up paying them both off.

CURRERI #2: Hum, well who cares about the quarter.

BERNSTEIN #3: Yeah, I mean ah what the hell. I don't pay nobody until the next day. I don't subtract no ribbons.

CURRERI #2: Oh, well, then that's, that's the only thing I have to do then.

BERNSTEIN #3: Because there is no such thing as an official number. And you can do the same thing I do when I get up in the morning. It just happened that I had a doctor's appointment this morning and couldn't get to your racing form until around ah . . .

CURRERI #2: Yeah, but the only thing with that is though CAL, is I used to do that every morning until I found out that that was wrong once.

BERNSTEIN # 3: Well it's not the idea of it being wrong, it's the idea that if you take the Morning Sun, the scratch sheet and the racing form and get a different figure from anyone of them, there's a question. And as soon as I got the racing form today it was 398, that was about quarter after 11. I rushed to the phone booth, made a few calls, got a hold of somebody and you know, just to see what they said and they said hold it up. And I held it up, and I ah I called her right away. And I said call everybody.

CURRERI #2: Hum.

BERNSTEIN #3: And she got a hold of your mother, I guess it was at home. What home, she said she was finished calling by 5 of 12, so whether she got her . . .

CURRERI #2: Yeah.

BERNSTEIN #3: It took her about 15 minutes to call everybody.

CURRERI #2: Ah the only thing that ah you upset me a little is that I thought may be they found out last night.

BERNSTEIN #3: No, no, no.

CURRERI #2: And didn't call nobody. I mean look if that's the way it happened, that's the way it happened. It's nothing you know, anybody can do.

BERNSTEIN #3: That one time, didn't I call your mother?

CURRERI #2: Yeah.

BERNSTEIN #3: That Sunday.

CURRERI #2: Well, the thing is though, ah you can tell your girl, give her my ah you know this number here and ah well you got them all, because you know I'm either here or home or someplace. You know if you find out that night.

BERNSTEIN #3: Oh look, if I find out that night, I am gonna get a hold of your mother right away or get a hold of you.

CURRERI #2: Yeah.

BERNSTEIN #3: Don't worry, ah look I would have been the happiest person in the world to make those calls last night.

CURRERI #2: Hum.

BERNSTEIN #3: Because ah huh, ah one thing I had the thing cut but still it's, christ it's $8,000.

CURRERI #2: I never had it cut. Listen on my new cut list, do I have one's across?

BERNSTEIN #3: I ah I don't have it here. I don't have it, ah look I'm call . . .

CURRERI #3: You can ask the girl ah no they don't have it either.

BERNSTEIN #2: I'm ah out down by Radecke Park in a phone booth.

CURRERI #3: Hum.

BERNSTEIN #2: All right, well . . .

CURRERI #3: Well . . .

BERNSTEIN #2: Now don't you, listen anytime I find it out, if it's 4 o'clock in the morning, I'll call.

CURRERI #3: Okay.

BERNSTEIN #2: And ah I'd do it to everybody.

CURRERI #3: All right, now you say 1 o'clock is safe the next day?

BERNSTEIN #2: I'd say 1:30 because the first race at Pimlico is at 1.

CURRERI #3: Uh huh.

BERNSTEIN #2: They might get in there at 1:10 and the line might be tied up for 10 minutes.

CURRERI #3: Uh huh. Okay, well that's just what I'll have to do, then that's all.

BERNSTEIN #2: I don't pay nobody until, until after I get an okay or I never did. Only you know like I pay you, there is a couple other ones I know, I'd tell. But that's a different story.

CURRERI #3: All right, well look I'll just tell everybody then, I'm not paying nobody until 1:30 the next day.

BERNSTEIN #2: Straighten them out, you're better off, what the hell the ah the one time can cost you a fortune.

CURRERI #3: It did.

BERNSTEIN #2: All right, okay, I'll talk to you later.

CURRERI #3: Okay CAL.

BERNSTEIN #2: All right, bye.

(End of Conversation)

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 576235 164

Supreme Court, U. S.
FILED
JUN 26 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1486

UNITED STATES OF AMERICA,
Petitioner,

v.

CALMAN BERNSTEIN,
Respondent.

On PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR CALMAN BERNSTEIN, RESPONDENT, IN OPPOSITION

ARNOLD M. WEINER,
M. ALBERT FIGINSKI,
10 Light Street, Suite 1200,
Baltimore, Maryland 21202.
Attorneys for Respondent.

The Daily Record Co., Baltimore, Md. 21202

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATEMENT	2
ARGUMENT	10
CONCLUSION	18

TABLE OF CITATIONS

Cases

Art Theatre Guild, Inc. v. Parrish, 503 F.2d 133 (6th Cir., 1974)	9
Berger v. New York, 388 U.S. 41	15
Di Bella v. United States, 369 U.S. 121	9
United States v. Bellosi, 501 F.2d 833 (D.C. Cir., 1974)	15
United States v. Brodson, 390 F. Supp. 774 (E.D. Wis., 1975)	13, 18
United States v. Chavez, 416 U.S. 562	14
United States v. Chiarizio, 388 F. Supp. 858 (D. Conn., 1975)	13, 18
United States v. Donovan, 513 F.2d 337 (6th Cir., 1975)	13, 17
United States v. Doolittle, 507 F.2d 1368 (5th Cir., 1975)	13
United States v. Eastman, 465 F.2d 1057 (3rd Cir., 1972)	17
United States v. Giordano, 416 U.S. 505	10, 14
United States v. Kahn, 415 U.S. 143	9, 12, 13, 14

PAGE

United States v. London, ___ F. Supp. ___ (No. B75-099) (D. Md., 1975) 18
United States v. Moore, 513 F.2d 485 (D.C. Cir., 1975) 13, 17

Statutes

18 U.S.C.:
1254(1) 2
1955 3
2516(1)(g) 12
2516(2) 12
2518(1)(b)(iv) 2, 10, 11, 15
2518(1)(e) 11, 14, 15, 16
2518(4)(a) 2
2518(5) 15
2518(8)(d) 11, 14, 16
3731 9

Miscellaneous

S. Rep. 1097, 90th Cong., 2d Sess. (1968), 2 U.S. Cong. & Adm. News (1968) 11, 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1486

UNITED STATES OF AMERICA,
Petitioner,

v.

CALMAN BERNSTEIN,
Respondent.

On PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR CALMAN BERNSTEIN, RESPONDENT, IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 509 F.2d 996. The opinions of the district court are reported at 363 F. Supp. 438 and 368 F. Supp. 757 (Pet. App. A, D and E).

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1975 (Pet. App. B). A petition for rehearing was denied on March 28, 1975 (Pet. App. C). The Chief Justice, on April 24, 1975, extended the time for the filing of a petition for a writ of certiorari to and including May 27, 1975. A petition for writ of certiorari was filed on May 27, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a person is "known", within the meaning of 18 U.S.C. 2518(1)(b)(iv) and 2518(4)(a), and therefore required to be named in an application and order for wire interception, when the law enforcement authorities have probable cause to believe that the person is committing the offense and using the telephone line for which the wire interception is sought.

2. Whether the district judge properly suppressed, as to the Respondent, evidence derived from a court-authorized wire interception, where the Respondent, although known to the Government to be a participant in the activity being investigated, and although known to be a user of the intercepted telephone line, had been named in neither the application nor order for the interception, as required by 18 U.S.C. 2518(1)(b)(iv) and 2518(4)(a), and where such omission was the result of conduct which the district judge found as a fact to be "tantamount" to a demonstration of "conscious disregard for the dictates" of the federal eavesdropping statute.

STATEMENT

The indictment in this case alleged, in one count, that the Respondent, Calman Bernstein, in association with

Robert S. Curreri and ten others, conducted an illegal gambling business, in the period from February to June, 1972, in violation of 18 U.S.C. 1955 (Jt. App. 12-13).[1] The theory of the prosecution was that the gambling enterprise was headed by Curreri; that its principal location was at the premises of the Ocean Pride Seafood Company, a Curreri venture, in Baltimore; that Respondent, Calman Bernstein, was a key confederate who performed the function of layoff man; and that various others, in lesser positions, assisted in the conduct of the illicit gambling business (Jt. App. 21-35, 50-66, 425-37).

The Government's evidence consisted principally of recordings of intercepted telephone conversations. The recordings had been obtained through a series of eavesdropping orders, each for a period of fifteen days, entered on March 30, April 14, May 1 and May 17, 1972 (Jt. App. 39-43, 69-72, 114-17, 141-44). The March 30 and April 14 orders authorized the interception of conversations upon three telephone lines at the Ocean Pride premises (Jt. App. 39-43, 69-72). The March 30 order also authorized interception of conversations upon a telephone line at a private apartment, used as an office in the Curreri operation, and the May 1 and 17 orders similarly authorized surveillance at private apartments (Jt. App. 114-17, 141-44).

The Respondent, Bernstein, moved timely for suppression of the evidence of his conversations during the period of the second eavesdropping, the surveillance under the order of April 14, 1972 (Jt. App. 154-75). The motion alleged that the Respondent, Bernstein, had been a target of the investigation from its inception;

[1] References are to the joint appendix in the court of appeals.

that, through informants and other investigative information, the Government, prior to any eavesdropping, had determined that he was implicated in the Curreri operation; that, through telephone calls intercepted on April 11 and 12, 1972, prior to the second application, he was known to be a user of the Ocean Pride telephone lines being surveilled; and that, pursuant to the provisions of the federal eavesdropping statute he should have been named in the application and order of April 14th (Jt. App. 155-57).

At a hearing on May 11, 1973, the Government resisted an evidentiary exploration. The prosecutor represented to the district judge that, prior to the April 14th order, the Respondent, Bernstein, was "not in any way connected with the operation" and that he was "not shown by any of our investigation to have any connection with Mr. Curreri" (Jt. App. 204).

In view of the conflicting proffers, the district judge ordered an evidentiary hearing, and in an opinion, filed on June 11, 1973, he set the standards which Bernstein would have to meet to be successful in his motion. "Before there is a need for a wiretap order to specifically list a person whose conversations are to be intercepted", the judge ruled, "the government must, at the time the order is applied for, have probable cause to be believe that person is involved in the criminal activity the wiretap seeks to monitor and is a user of the communication facility for that illegal purpose (Pet. App. D, pp. 27a-28a). T e defendant's burden, he added, was substantial. ". . . (T) he court believes a strong and clear, and not questionable, showing of probable cause existing at the time of the application is needed to sustain a motion to suppress after the wiretap has concluded, such a showing being tantamount to demonstrating a conscious disregard for the dictates of Title III" (Pet. App. D, p. 29a).

At the evidentiary hearing, held on August 9, 1973, testimony was taken from Special Agent Thomas Kelly, the man in charge of the investigation, and from the F.B.I. agents who assisted him. Documentary data was also received (Jt. App. 384-456). The evidence, in sum, substantiated the Respondent's allegations and contradicted the representations which had been made by the Government at the earlier hearing on May 11, 1973. It was shown that the Respondent, Bernstein, had been under investigation for alleged gambling activity for almost a year prior to the eavesdropping and that he had been named by at least two reliable informants as Curreri's associate (Jt. App. 314-44, 424-27, 431-32, 441). It was also proven that the agents and the prosecutor, prior to the inception of the eavesdropping, had credited the informant information and had determined that an eavesdropping upon Curreri's telephone lines was likely to intercept conversations of Bernstein (Jt. App. 346-48, 352-53, 421-23, 428-40). It was also demonstrated that Bernstein was in fact overheard during the first surveillance engaging in conversation related to the gambling business; that the agents recognized him; and that they took special note of the fact that, as they had earlier anticipated, he was a user of the lines being tapped (Jt. App. 272-81, 332-36, 357-82, 397-414).

Of particular significance was the evidence relating to the events surrounding the initiation of the interception. It was shown that on March 1, 1972, when Special Agent Kelly, together with the prosecutor in this case, drafted the first affidavit in support of the initial application, they named the Respondent, Bernstein, and linked him with Curreri (Jt. App. 352-55, 428-40). A copy of this draft, received in evidence, demonstrated that, on January 18, 1972, a confidential informant had advised the F.B.I. that, as of that date, "Robert Curreri

was operating a large numbers gambling business and giving his lay-off to Cal Bernstein". The draft went on to recite the proven reliability of the informant and it stated that he had acquired his information "through personal conversation with key individuals involved in the operation" (Jt. App. 431-32). Other information with respect to Bernstein, which corroborated the informant, was also described (Jt. App. 431-32). The draft concluded that Curreri and Bernstein were then engaged together in an illegal gambling business; that the telephones at Ocean Pride Seafood, among others, were being used to carry out the illegal business; and that evidence against them might be obtained through interception of wire communications (Jt. App. 428-29; Ct. Ex. 5). In his testimony at the evidentiary hearing, Agent Kelly added that this determination had been based, in part, upon his special expertise in gambling cases (Jt. App. 347-48).

It was also shown that on March 3, 1972, the proposed affidavit was submitted to the F.B.I. office in Washington, D.C. for review (Jt. App. 42), and that, four days later, on March 7th, the Washington office responded by teletype, advising that, "A review of your affidavit indicates that the subjects are engaged in a gambling operation which appears to warrant Title III electronic surveillance coverage" (Jt. App. 421; Ct. Ex. 1). The teletype requested, however, "certain additions", and, most pertinent to this case, said that, "To corroborate information provided by informants, you should attempt to develop additional current information regarding . . . Calman Bernstein" (Jt. App. 421; Ct. Ex. 1).

It was also proven that, on the next day, March 8, 1972, in response to the teletype, another confidential informant was interviewed (Jt. App. 426-27; Ct. Ex. 4).

This informant told the F.B.I. that Curreri was then "active in the numbers field" and that he was "laying off to Cal Bernstein" (Jt. App. 427; Ct. Ex. 4). It was noted on the report of this interview that the information was reliable (Jt. App. 426; Ct. Ex. 4). Special Agent Kelly was advised immediately of this most recent information, and in his testimony at the hearing he confirmed that this informant too was reliable (Jt. App. 324, 426).

The record demonstrated that, notwithstanding the current information obtained on March 8th, it was decided that all reference to Bernstein in the application, affidavit and order would be deleted. The application which was presented to the authorizing judge by Special Agent Kelly and the prosecutor on March 30, 1972, named only Curreri and four minor figures (Jt. App. 14-18). The order, signed by the judge on that same date, was similarly framed (Jt. App. 39-43).

Other significant evidence, relating to conversations intercepted during the initial eavesdropping, was also produced. It was shown that on April 11, 1972, during the period of the first authorization, the agents monitored an important call from Bernstein to Curreri. The conversation dealt almost entirely with procedures to be employed in paying winning numbers bettors and with steps to avoid pay offs on wrong numbers (Jt. App. 272-78, 393-406). Bernstein and Curreri both said that they would have further business discussions by telephone, and the monitoring agents made special note of this fact.[2] In another conversation, overheard on

[2] It was noted in the log that, "Bob [Curreri] tells Cal [Bernstein] to give this number to your girl and have her call me", and, "Cal says if I find out I will call you there at home or at your mother's" (Jt. App. 398; DX 3a). Bernstein was quoted as instructing Curreri to "tell your girl . . . this

April 12, 1972, it was learned that third persons would attempt to contact Bernstein through Curreri; that Curreri was in possession of Bernstein's private telephone number; and that this private number was for Curreri's use alone (Jt. App. 407-11; DX 4a, 4b).

The record also showed that on April 14, 1972, when the first authorization was about to expire, Special Agent Kelly and the prosecutor presented their application and affidavit for the second eavesdropping. In spite of the accumulation of knowledge about Bernstein, including the intercepted calls of April 11th and 12th, and notwithstanding the clear expectation that Bernstein would make further use of the monitored lines, the second application did not name him and he was nowhere mentioned in the supporting affidavit (Jt. App. 44-68). As a consequence, Bernstein was not identified in the order of April 14th as a person whose conversations would be intercepted (Jt. App. 69-72). Throughout the period of the second order, however, the agents intercepted conversations in which Bernstein participated. The recordings and transcripts of these calls, eight in number, were the subject of the motion to suppress (Jt. App. 154-57, 199).

On December 11, 1973, the district judge filed his second opinion and entered an order suppressing, as against the Respondent, Bernstein, the evidence relating to Bernstein's calls during the period of the second interception (Pet. App. E, pp. 32a-44a; Jt. App. 11, 457-66). The opinion set forth detailed findings of fact (Pet. App. E, pp. 37a-45a; Jt. App. 461-64). The district judge decided, on the basis of the facts determined, that

number here" (Jt. App. 404). Bernstein also advised Curreri that, upon securing certain information relevant to the gambling enterprise, I'll call" (Jt. App. 404, 405). The conversation ended with Bernstein saying, "I'll talk to you later" (Jt. App. 406).

Bernstein had met his burden of proof. The evidence had demonstrated such a "strong and clear . . . showing of probable cause", the district judge held, that the decision not to name Bernstein in the application and order had been "tantamount to demonstrating a conscious disregard for the dictates of Title III" (Pet. App. E, pp. 36a, 45a; Jt. App. 460-61). Since the Respondent, Bernstein, was known to the Government, the district judge concluded, and since his name was intentionally omitted from the application and order, the second eavesdropping, as to him, was unlawful, and he was entitled to suppression (Pet. App. E, p. 45a; Jt. App. 464).[3]

The Government entered an interlocutory appeal pursuant to 18 U.S.C. 3731. The court of appeals affirmed (Pet. App. B, p. 19a).[4] The findings of the district judge were accepted as having been supported by the record (Pet. App. A, pp. 13a-15a). Applying the standard enunciated in *United States v. Kahn*, 415 U.S. 143, 155, decided by this Court while the appeal in the present case was pending, the court of appeals held that a person is "known", and therefore required to be named in an eavesdropping application and order,

[3] A supplemental motion, filed after the evidentiary hearing, sought suppression of the evidence obtained during the period of the first eavesdropping, under the order of March 30, 1972 (Jt. App. 176-78). The supplemental motion was denied (Pet. App. E, p. 42a).

[4] The statute only permits interlocutory appeals by the Government. Since there was no final judgment against the Respondent, by virtue of the fact that the indictment against him remained open, the Respondent could not cross appeal from the district judge's ruling on the supplemental motion. *Di Bella v. United States*, 369 U.S. 121; *Art Theatre Guild, Inc. v. Parrish*, 503 F.2d 133 (6th Cir., 1974). The opinion of the court of appeals, while not directly concerned with the ruling on the supplemental motion, implied that it was correctly denied (Pet. App. p. 14a).

when the Government has probable cause to believe that he is committing the offense and may be overheard on the intercepted telephone lines (Pet. App. A, p. 13a).

The court of appeals also held that the identification requirements of 18 U.S.C. 2518(1)(b)(4) and (4)(a) are an integral part of the statutory scheme; that they must be followed to effectuate the underlying legislative policy; and that compliance with their command is a statutory precondition to lawful eavesdropping (Pet. App. A, pp. 3a-11a). Under the rule of *United States v. Giordano*, 416 U.S. 505, therefore, the court of appeals concluded, suppression was warranted (Pet. App. A, pp. 5a-11a).

ARGUMENT

1. The government contends that the decision of the court of appeals represents an unwarrantedly expansive reading of 18 U.S.C. 2518. The pertinent statutory language, about which this complaint is voiced, is that:

> "(1) Each application for an order authorizing or approving the interception of a wire or oral communication . . . shall include the following information:
>
> * * * * * *
>
> (b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including . . . (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;
>
> * * * * * *
>
> (4) Each order authorizing or approving the interception or any wire or oral communication shall specify—
>
> (a) the identity of the person, if known, whose communications are to be intercepted;"

The Government argues that the statute should be read as if it required the identification of "only one" or a "single" person committing the offense (Pet. 8, 13). Engrafted onto the statute, the argument continues, should be the requirement that this one person be "the principal target" or "the primary target" of the investigation (Pet. 8, 9, 12, 15, 16).

The Government's reading of the identification requirement is wholly without reference to the context in which it appears. The Government gives no recognition to the fact that known participants are required to be identified as part of the statutory command that an eavesdropping application contain "a full and complete statement" of the facts and circumstances. (18 U.S.C. 2518(1)(b)). The Government's suggestion, contrary to the statutory mandate, is that a perfunctory and incomplete effort at identification, so long as it names a single person, should be deemed acceptable. It is contrary to the manifest legislative purpose that the requirement of "a full and complete statement" is a "command of particularization". (S. Rpt. No. 1097, 90th Cong., 2d Sess. (1968), 2 U.S. Cong. & Adm. News (1968), 2190).

The identification provisions, moreover, operate in conjunction with other statutory provisions which, by their express terms, contemplate the identification of more than one person in the application and order. Section 2518(1)(e), for example, requires that the application contain a "full and complete statement" concerning "all previous applications" for interceptions "involving *any of the same persons* . . . specified in the application" (Emphasis supplied). Section 2518(8)(d) makes it mandatory for the judge to issue notice and an

inventory upon the termination of the eavesdropping, "on *the persons named* in the order or the application" (Emphasis supplied).

The essence of the Government's argument, that this Court adopt a "principal target" formulation for satisfaction of the identification requirement, is divorced from reality. It proceeds from the mistaken premise that a criminal investigation can be expected to have but one principal target. The eavesdropping statute, however, is aimed at a group of offenses in which there are usually multiple subjects. The statute authorizes electronic eavesdropping, for example, for obtaining evidence of "any conspiracy" to commit a variety of federal or state crimes. (18 U.S.C. 2516(1)(g), (2)). In such cases there must, of necessity, be more than one principal target. The present case, moreover, is typical. As the record below demonstrates, there were several persons who were the subjects of the investigation in this case, and one of them, from the inception, was the Respondent, Bernstein (Jt. App. 425-41).

The court of appeals, in requiring the identification of those persons for whom there was probable cause to justify a belief of complicity, and who might be overheard in the eavesdropping, followed the teaching of this Court in *United States v. Kahn*, 415 U.S. 143, 155, where it was said that:

> "Title III requires the naming of a person in the application or interception order only when the law enforcement authorities have probable cause to believe that that individual is 'committing the offense' for which the wiretap is sought."

The clear import of the quoted statement is that a person must be named in the application and order whenever there is probable cause to believe that he is a participant in the offense and may be intercepted in the

course of the wiretap. Other federal courts have drawn this same lesson from *Kahn*. See, e.g., *United States v. Donovan*, 513 F.2d 337, 341 (6th Cir., 1975); *United States v. Moore*, 513 F.2d 485 (D.C. Cir., 1975); *United States v. Chiarizio*, 388 F. Supp. 858, 867-69 (D. Conn., 1975); *United States v. Brodson*, 390 F. Supp. 774, 783-84 (E.D. Wis., 1975).[5]

The Government complains that the statement in *Kahn* was only dictum; that it embodied an unfortunate and incorrect statutory construction; and that it should be corrected in the present case. The statement in *Kahn*, however, was not inadvertent. Indeed, in that case, the Government urged that the statute should be so construed. The Solicitor General, in his petition for certiorari in *Kahn*, asserted:

> "In wiretap situations there are generally three classes of persons involved: First, the person or persons against whom the investigation is directed and probable cause is shown . . .
>
> * * * * * *
>
> It is our position that only persons in the first group need be identified in the application and order . . ."
>
> (Petition for Certiorari, No. 72-1328, p. 8)

[5] The only expression of a contrary view was by a divided panel of the Fifth Circuit, over the strong dissent of Judge Thornberry, in *United States v. Doolittle*, 507 F.2d 1368 (1975). Judge Thornberry noted that the case had been briefed prior to this Court's decision in *Kahn* and that the panel had rendered its decision without adequate assistance from the parties. It does not appear that the panel in *Doolittle* was made aware of the decision of the Fourth Circuit in the present case. Although the decision in this case had been rendered three weeks earlier, it was not yet officially reported. The Fifth Circuit has since granted a rehearing *en banc*. The rehearing was held on June 3, 1975, and, as of this date, no decision has been rendered.

In his brief on the merits, moreover, the Solicitor General acknowledged that, "Manifestly, the identification requirement imposed by Congress relates to knowledge of probable criminal complicity . . ." (Brief for United States, No. 72-1328, p. 14). The Government itself, therefore, has not heretofore read the statute as being satisfied by the naming of a single person, and it has acknowledged, as this Court declared in *Kahn*, that "persons against whom the investigation is directed and probable cause is shown . . . need be identified in the application and order".

2. The Government contends that strict enforcement of the identification requirement does not "significantly further any substantial policy interest"; that the failure to identify known participants should be regarded as a clerical omission; and that, under the rule of *United States v. Chavez*, 416 U.S. 562, suppression is inappropriate (Pet. 7, 14, 18). Contrary to the Government's contention, the identification provision has a central role in the statutory scheme. Other important safeguards, particularly those relating to the disclosure of prior eavesdropping and the service of inventory notice, are dependent entirely upon compliance with the identification provision (18 U.S.C. 2518(1)(e) and (8)(d)). If the government were permitted to ignore the identification requirement, and to designate no more than one of the persons against whom an eavesdropping is directed, the other provisions, which are dependent upon identification for their operation, would become meaningless. The court of appeals, therefore, properly held that the identification requirement "directly and substantially" implements the Congressional design, and that the holding of *United States v. Giordano*, 416 U.S. 505, requires suppression for failure to comply with the identification requirement.

Congress was concerned with the potential for abuse of the wiretapping tool through successive and prolonged eavesdroppings. This same concern had been voiced by this Court, in the constitutional context, in *Berger v. New York*, 388 U.S. 41, 59-60. Accordingly, the eavesdropping statute limits the duration of a single eavesdropping to thirty days (18 U.S.C. 2518(5)). To prevent the circumvention of this limitation, through the use of multiple applications, which might be addressed to different judges, the statute requires the law enforcement authorities to detail the history of prior eavesdroppings upon the conversations of the same subjects. Section 2518(1)(e), as we noted earlier, requires that the application contain "a full and complete statement of the facts concerning all previous applications . . . made to any judge for authorization to intercept . . . wire or oral communications involving any of the same persons . . . specified in the application, and the action taken by the judge on each such application". The importance of this safeguard was underscored in *United States v. Bellosi*, 501 F.2d 833 (D.C. Cir., 1974). There, the application identified three persons as the subject of the eavesdropping, but it omitted the prior history of applications involving one of them. Since disclosure of prior applications is a statutory precondition designed to protect against prolonged and abusive use of wiretapping, it was held that failure to make the disclosure required suppression.

The Government's petition in the present case appears to acknowledge the correctness of the *Bellosi* holding (Pet. p. 16, n. 16). But the operation of Section 2518(1)(e) is dependent, by its own terms, upon the extent to which the government adheres to the identification requirement of Section 2518(1)(b)(4). If the Government were to be permitted to restrict its identification of

known participants, as it urges in this case, it would relieve itself, correspondingly, of much of its duty to disclose the history of prior eavesdroppings. In the *Bellosi* context, for example, if the Government had been permitted to refrain from naming one of the three subjects of the surveillance, it would have had no duty, under Section 2518(1)(e), to divulge its prior intrusions upon his conversations.

The operation of the provision with respect to notice and inventory is also dependent upon the adequacy of compliance with the identification provision. Section 2518(8)(d) makes it mandatory for notice to be served "on the persons named in the order or the application". To the extent that the government is permitted to avoid identifying the subjects of its eavesdropping, it may also avoid notifying them that they were the subjects of an intrusion. The inventory and notice requirement is designed to alert the community, through notification to those most directly affected, that eavesdropping has taken place. The Senate Report observed that, "This provision alone should insure the community that the techniques are reasonably employed" (S. Rpt. 1097, 90th Cong., 2d Sess. (1968), 2 U.S. Cong. & Adm. News (1968), 2190).

The petition for certiorari acknowledges that the decision below "will strongly encourage the naming in applications and interception orders of all persons who may eventually be overheard" (Pet. p. 13). This encouragement will insure the effective operation of those provisions which are dependent upon fulfillment of the identification requirement, and, as a consequence, it will further the aims of the statute. As the court of appeals also observed, it should not be assumed that either the Attorney General, who authorizes an interception, or the issuing judge, who grants the order,

would have no interest in knowing the extent to which the eavesdropping dragnet is expected to be employed (Pet. App. A, pp. 7a-9a).

Two other courts of appeal, in accord with *Bernstein*, have held that a person is "known" within the meaning of the statute when there is probable cause to believe that he is implicated in the offense and likely to be overheard over the intercepted line; that the identity of such a "known" individual must be brought to the attention of the judge ruling on the wiretap request; and that suppression of evidence is the appropriate remedy when the Government illegally fails to name such a "known" individual in the wiretap application. (See: *United States v. Donovan*, 513 F.2d 337 (6th Cir., 1975) and *United States v. Moore*, 513 F.2d 485 (D.C. Cir., 1975)). The Sixth Circuit, in *Donovan*, reached its result independently of this case at about the same time that the Fourth Circuit rendered its decision here. The District of Columbia Circuit, in *Moore*, found the decision of the court of appeals in this case "persuasive" and followed it. (513 F.2d 485, 494, 497, n. 34).

3. The Government claims that enforcement of the indentification requirement "creates serious practical difficulties for law enforcement" (Pet. p. 9). This is an inappropriate case for the consideration of such a complaint. As we discussed earlier, the circumstances in the present case were so compelling, and the failure to name Bernstein so inexplicable, as to require the district judge to conclude that the violation was "tantamount to demonstrating a conscious disregard for the dictates of Title III" (Pet. App. E, pp. 36a, 45a; Jt. App. 460-61). The petition for certiorari concedes that conscious disregard of the identification requirement justifies suppression (Pet., p. 13, n. 13). (Cf. *United*

States v. Eastman, 465 F.2d 1057 (3rd Cir., 1972)). In light of the findings of the district judge here, adequately supported by the record, the Government should have no quarrel with the imposition of the sanction in this case. The identification provisions were advertently denigrated in this case, and the courts below correctly refused to countenance the lawlessness.

Furthermore, the government's expressed fears have not been justified by experience. There has been no demonstrable administrative inconvenience in complying with the identification requirement. The recently decided cases show that the lower federal courts have experienced little difficulty in applying the standard. (See: *United States v. Chiarizio*, 388 F. Supp. 858 (D. Conn., 1975); *United States v. Brodson*, 390 F. Supp. 774 (E.D. Wis., 1975); *United States v. London*, . . . F. Supp. . . . (No. B75-099) (D. Md.), decided June 13, 1975 and not yet officially reported). A salutory rule should not be discarded on the basis of imagined, and unrealized, difficulties.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ARNOLD M. WEINER,
M. ALBERT FIGINSKI,
10 Light Street, Suite 1200,
Baltimore, Maryland 21202.
Attorneys for Respondent.

Supreme Court, U. S.
FILED
SEP 23 1975
MICHAEL RODAK, JR., CLERK

No. 74-1486

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

CALMAN BERNSTEIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1486

UNITED STATES OF AMERICA, PETITIONER

v.

CALMAN BERNSTEIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This memorandum is to advise the Court of recent developments in two cases related to the government's petition for a writ of certiorari in this case.

1. In our petition (p. 7, n. 5) we noted that the decision of the Fourth Circuit in this case conflicted with that of a panel of the Fifth Circuit in *United States* v. *Doolittle*, 507 F.2d 1368. However, because *Doolittle* was then pending before the Fifth Circuit on rehearing *en banc*, we did not contend that re-

view by this Court was necessary to resolve an established conflict among the circuits. However, on September 2, 1975, the *en banc* Fifth Circuit affirmed the convictions in *Doolittle* on the basis of the panel opinion (see App. A, *infra*). The majority of the panel had originally held (App. B, *infra*), on facts similar to those in the instant case, that a failure to identify known persons in a wire interception application would not result in suppression of evidence where there was substantial compliance with Title III, no prejudice to unnamed persons, and no evidence of government bad faith. Neither the panel nor the court *en banc* discussed the serious practical question of who must be identified in an intercept application. (But see Judge Godbold's dissent, App. A, *infra*, pp. 7a-9a.) Hence, there is now an established conflict in the circuits on the question whether suppression is required for an innocent failure to identify a known person. Moreover, guidance from this Court is still required on the question of the scope of the identification requirement of 18 U.S.C. 2518(1)(b)(iv).

2. Our petition for certiorari in *United States* v. *Donovan*, No. 75-212, raises, *inter alia*, the same issues presented here. In that petition we noted (p. 8, n. 4) that the District of Columbia Circuit had followed the holding of the court below in *United States* v. *Moore*, 513 F.2d 485, 492-494, and that our petition for rehearing *en banc* was then pending. That petition was denied on July 28, 1975. However, on September 9, 1975, the court granted the govern-

ment's motions to recall and stay reissuance of the mandate pending this Court's disposition of the instant case.

3. We pointed out in our *Donovan* petition (pp. 18-19) that *Donovan* presents not only the issues involved in this case but also other issues important to the implementation of Title III. Accordingly, we suggested that this Court may wish to consider hearing *Donovan* plenarily, rather than this case. For the same reason, the Court may wish to consider both petitions for certiorari together, since it may prefer to grant *Donovan* and hold this petition for appropriate disposition in light of its decision in *Donovan*.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 72-3263

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

BILLY CECIL DOOLITTLE, WILLIAM AUGUSTUS SANDERS, JR., ERNEST MASSOD UNION, JULIAN WELLS WHITED, FRANK JOSEPH MASTERANA, CLIFF ANDERSON, DARNICE T. MALLOWAY, AND WILLIAM E. BAXTER, DEFENDANTS-APPELLANTS

Sept. 2, 1975

Appeals from the United States District Court for the Middle District of Georgia. William A. Bootle, Judge, 341 F.Supp. 163.

Before BROWN, Chief Judge, and WISDOM, GEWIN, BELL, THORNBERRY, COLDMAN, GOLDBERG, AINSWORTH, GODSBOLD, DYER, SIMPSON, CLARK, RONEY and GEE, Circuit Judges.*

PER CURIAM.

The Court voted to reconsider this case *en banc* primarily to determine the correctness of the issue on which the panel divided: whether the failure to name defendants Anderson, Baxter and Sanders in the

---

* Circuit Judge Morgan did not participate in the decision of this case.

wiretap interception order required suppression in their trials of intercepted telephone conversations to which they were parties. A majority of the en banc court agrees with the panel's resolution of the issue and the convictions of Anderson, Baxter and Sanders are affirmed on the basis of the panel opinion. *United States* v. *Doolittle*, 507 F.2d 1368 (5th Cir. 1975). Having considered all issues in the case, the Court agrees that the panel correctly decided the issues on which the panel was itself unanimous.

Affirmed.

BROWN, Chief Judge, and WISDOM, THORNBERRY, GOLDBERG and SIMPSON, Circuit Judges, dissent from the affirmance of the convictions of Anderson, Baxter and Sanders, and would reverse for the reasons stated in Judge Thornberry's dissent to the panel decision. 507 F.2d at 1372. *Cf. United States* v. *Bernstein*, 509 F.2d 996 (4th Cir. 1975), *petition for cert. filed*, 43 U.S. L.W. 3637 (U.S. May 27, 1975) (No. 74-1486).

GODBOLD, Circuit Judge (dissenting):

The problem presented is whom must the government name in its applications for wiretap orders under the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520. The pertinent section requires the government to state in its application for a wiretap order "the identity of the person, if known, committing the offense and whose communications are to be intercepted . . .," § 2518(1)

(b)(iv). The court order must state the "identity of the person if known, whose communications are to be intercepted . . .," § 2518(4)(a).[1] Defendants contend that the government must name every person who it has probable cause to believe is committing the crime being investigated. The Fourth and Sixth Circuits have adopted that view. *United States* v. *Bernstein*, 509 F.2d 996 (CA4, 1975); *United States* v. *Donovan*, 513 F.2d 337 (CA6, 1975). The government contends, in effect, that so long as it gives the name of one person with respect to whom it has probable cause it need not reveal the names of others with respect to whom probable cause is also present.

Neither approach to the government's obligation is workable. The defendants' view is too expansive. A single wiretap may produce dozens if not hundreds of names of individuals not seriously under investigation but with respect to whom the existence of probable cause might be found. The probable cause approach would stifle if not smother the law enforcement efforts of government agencies with administrative labors. I think Congress did not intend such a result.

The government's view is too narrow. Congress did not intend to permit the government to name whomever it chooses and no others. The thrust of the wiretap statute is judicial supervision of neces-

---

[1] The insignificance of the discrepancy between the language relating to wiretap applications and that relating to wiretap orders is discussed in *United States* v. *Kahn*, 415 U.S. 143, 152, 94 S.Ct. 977, 982, 39 L.Ed.2d 225, 235 (1974).

sary executive invasions of privacy. Such supervision can only serve its function where the supervising court has sufficient access to the information needed for due consideration of wiretap applications. In these *ex parte* proceedings the government is the only source of information. An interpretation that requires the government agency to name only one person when it is actively directing the interception against many more persons reads the naming requirement out of the Act and shifts the locus of informed decision-making from the courts to the agencies. This is contrary to the intent of Congress.

The majority panel decision, adopted by the en banc majority, does not decide whether there was or was not probable cause with respect to Anderson, Baxter and Sanders. Judge Thornberry pointed out in his dissent to the panel opinion that it did not come to grips with this question. Rather, the panel opinion appears to say that, even if there was probable cause with respect to these defendants, the governmental action is nonetheless salvaged by an amalgam of substantial compliance with the statute, no prejudice to the defendants, and no bad faith or subterfuge by the government I have great difficulty with this cure by analgesic balm. The statutory scheme recognizes the privacy interest of one using telephone communications and makes wiretapping a felony except for statutorily prescribed exceptions, 18 U.S.C. § 2511(1). I think none of these grounds is adequate to overcome the policies inhering

in the congressional determination to prohibit and severely punish unauthorized wiretapping, §§ 2511 (1) and 2520.

Construing after-the-fact performance of the requirement of § 2518(8)(d) as substantial compliance misses the thrust of the statute, which is not disclosure to the victim after the fact but review by a federal district judge before the fact. What is missing from the government's proffered compliance is the federal district judge's review of the wiretap plans to protect the privacy interest of the unnamed persons. This is the heart of the statutory scheme. When the person is not named the further disclosure requirements of § 2518(1)(e) are also not triggered and judicial supervision becomes a charade.[2]

Even if that right is discounted, reliance upon after-the-fact compliance with the requirements of § 2518(8)(d) as substantial compliance with the statutory scheme renders the application and order requirements nugatory. If the government need not name a suspect so long as he is given after-the-fact notice and transcripts, then the government need never disclose names in the original application, for it could always give retrospective validity to its actions by sending notice and transcript to whomever it later chooses to prosecute. Without names the

---

[2] No court is empowered to consider after the fact whether the wiretap was proper in terms of balancing the conflicting interests of privacy and law enforcement, as the application court is empowered to do under § 2518(4), discussed *infra*. Thus the necessity for proper and informed decision on that question before the fact looms larger in significance.

courts will be seriously disabled in their function of reviewing the applications for probable cause and considering other relevant factors under § 2518(3). The limiting and deterrent features of the statute would be lost. Congress surely did not intend to allow this.

Except to the extent, if at all, that there may be substantial rather than literal compliance with the statute, the statutory scheme does not allow a "no prejudice" or "error without injury" approach. The statute recognizes the right of privacy of one using telephone communications and makes wiretapping a felony except for statutorily prescribed exceptions, 18 U.S.C. §§ 2511(1)(a) and (b) and 2518. One whose privacy has been invaded by an action felonious if not excepted by statute may not be denied suppression on the ground that he really has not been hurt very much.

With respect to good faith, a governmental pure heart does not validate an otherwise invalid wiretap any more than it would a private person's erroneous but good faith belief in the legality of his wiretap of a neighbor or competitor. Even if the government is to be given greater deference, I have difficulty understanding what constitutes good faith in this context.[3] It is obvious that if the government is not required to name a person with respect to whom it has probable cause, then it does not act in bad faith in not naming him. As employed by the majority the phrase "good faith," amorphous and undefined, is not a tool of analysis but merely a palliative. It has no relevance to whether the function of the statute —judicial supervision of executive invasions of individual privacy—has been served.

[3] This is wholly different from the good faith referred to in § 2520, which goes to reliance on a district judge's order, a specific and well-defined concept of good faith unlike that offered by the majority here. Moreover, the good faith there protects government employees from severe after-the-fact sanctions for human errors to which their work particularly exposes them; here it is being used to undercut the before-the-fact protections sought to be provided by the statute. Taken together they empower the very abuses, under color of law and protected from punishment, which this act was designed to prevent.

Since I reject the arguments by which the majority resolve this case, I must consider the question of what triggers the naming requirement of § 2518(1)(b)(iv). Originally I thought that I would join my fellow dissenters, who have taken a stand on *United States* v. *Kahn*, 415 U.S. at 155, 94 S.Ct. at 984, 39 L.Ed.2d at 237, and *United States* v. *Bernstein*, 509 F.2d at 1001-1002.[3a] See the dissent from the panel opinion, 507 F.2d 1368, 1372, 1373, adopted by the en banc minority. On further reflection I have concluded that I cannot join them in that position. At the most *Kahn* only says that if the government does not have probable cause to believe a person is committing the crime being investigated then the government need not name that person under § 2518(1)(b)(iv),[4] 415 U.S. at 155, 94 S.Ct. at 984, 39 L.Ed.

[3a] *See also United States* v. *Donovan*, 513 F.2d at 341.

[4] I think that § 2518(3) poses a distinct naming requirement, *see infra*.

2d at 237. I do not read this to decide the converse proposition that if the government does have probable cause it must name the person. We must then look to the statute to determine whether Congress indicated more definitely whom it wanted named in wiretap applications.

Steering between the Scylla of a stifling administrative burden and the Charybdis of unchecked executive power, I would require the government to name all those individuals "against whom the interception was directed," as that phrase is used in the definition of aggrieved person in § 2510(11).[5] This definition is keyed to the standing and substantive rights given in § 2518(10)(a) and reflecting a congressional concern for protecting the interests of those subjected to government investigations.

I do not see how the naming requirement can be any narrower.[6] As I have already pointed out, to permit the government to conduct an investigation by wiretapping without ever disclosing to a court the persons it hopes to hear and ultimately convict makes mincemeat of the statutory system. This could subject to intentional, repeated, unsupervised and un-

[5] The important details of who must carry exactly what burden of proof must be left to the district courts to work out through practical experience.

[6] Whatever bearing some of the language in *Kahn* may have on this point, I think it is sufficient to say that the individual in that case whose conversation was overheard was not under investigation and that the government made a convincing showing to that effect.

punishable[7] invasions of privacy any person who talks by telephone with persons—only one per wiretap would be necessary under the majority's approach—against whom the government is able to make some showing of probable cause. The essence of the § 2518(1)(e) requirement of disclosure to the application court of prior wiretaps is to prevent such activity. It cannot be prevented unless the government is required to apprise that court of the identity of the persons at whom investigation and wiretap are directed.[8]

If one is to move toward a broader reading of the naming requirement, I see no stopping point short of probable cause. For the reasons noted above I think such a requirement would be too broad because of the administrative burdens it would place on law enforcement agencies.

The approach which I have taken meshes neatly with the application-and-order procedure under which all wiretaps are to be conducted. The statute posits that courts should supervise law enforcement agencies' wiretap activities. Wiretaps are of course a powerful investigative tool, but the concomitant in-

[7] By reason of § 2520.

[8] The target-naming requirement would cut off more severe abuses, by judicial supervision where the persons are named, and by the sanctions of §§ 2511(1) and 2520 where they are not named. The good faith defense provided in § 2520 would be unavailable where the naming requirement is clear and the failure to name is egregious, notwithstanding the presence of a § 2518(3) order.

vasions of privacy necessarily occurring must be weighed against the investigative convenience. The ultimate decision-maker is the federal district court. Judicial supervision of wiretapping begins when a law enforcement agency applies to a court for a wiretap order. Section 2518(1) requires the application to disclose authorization for the application under §§ 2516(1) or (2), the phone to be tapped, the crime believed to be committed, the name of the suspect, a statement that other investigative means have been exhausted or would not be productive, and prior wiretaps of the persons named. The next subsection authorizes the judge to "require the applicant to furnish additional testimony or documentary evidence in support of the application," § 2518(2). The judge who must weigh the competing values of privacy and efficient law enforcement is thus empowered to obtain information pertinent to those factors from the only party before it in these *ex parte* proceedings. The separate authorization of § 2518(2) would be redundant and superfluous if it reached no more than is already covered by § 2518(1)(b), since the judge could always refuse to issue an order until the law enforcement agency had satisfactorily complied with that subsection.

Section 2518(2) is an invitation to the judge receiving the application to plumb the scope and purpose of the government's investigation. It authorizes him to inquire into whatever other purposes the government agency might have, into possible and sus-

pected wrongdoers not yet the subject of probable cause beliefs, and into other collateral matters which, although not required by the bare application requirements of § 2518(1)(b), the court might consider in deciding whether to grant the order.

The judge's duty to weigh these collateral and competing factors is contained in the next subsection, § 2518(3), which does not require, but only authorizes, issuance of a wiretap order after the appropriate findings of probable cause—"the judge *may* enter an ex parte order . . . if the judge determines on the basis of the facts submitted by the applicant that . . . there is probable cause for belief that an individual is committing . . . a particular offense" and that a wiretap will disclose pertinent communications, along with other necessary findings (emphasis added).[9] The judge has discretion not to issue a wiretap order even if he is satisfied that a showing of probable cause has been made. The authorization to require additional information in § 2518(2) read in conjunction with this discretion suggests a broad grant of power to the courts to oversee governmental wiretapping.

In the instant case, I would remand to the District Court for a hearing on whether Anderson, Baxter and Sanders were targets of the government's

---

[9] Compare § 2518(10)(a), which refers to a presumption of illegality "if the motion [to suppress] is granted . . ." The conditional "if" here could go to a finding of grounds for suppression, as well as to judicial discretion. But there is no such ambiguity in § 2518(3), which must include discretion.

investigation when the relevant wiretap application was made, that is, whether the wiretaps were directed against them, taking due account of whether the government can reasonably be believed not to be investigating these persons in light of the information it had already collected against them.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 72-3263

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

BILLY CECIL DOOLITTLE, WILLIAM AUGUSTUS SANDERS, JR., ERNEST MASSOD UNION, JULIAN WELLS WHITED, FRANK JOSEPH MASTERANA, CLIFF ANDERSON, DARNICE T. MALLOWAY, AND WILLIAM E. BAXTER, DEFENDANTS-APPELLANTS

Feb. 14, 1975

* * * *

Floyd M. Buford, Macon, Ga., for Union and Whited.

Oscar B. Goodman, Las Vegas, Nev., for Doolittle, Sanders and Masterana.

Louis Weiner, Jr., Las Vegas, Nev., Manley F. Brown, Macon, Ga., for Anderson.

Wesley R. Asinof, Atlanta, Ga., for Malloway and Baxter.

William J. Schloth, U.S. Atty., Charles T. Erion, Asst. U.S. Atty., Macon, Ga., for plaintiff-appellee.

Appeals from the United States District Court for the Middle District of Georgia.

Before THORNBERRY, AINSWORTH and RONEY, Circuit Judges.

RONEY, Circuit Judge:

All defendants were convicted in a non-jury trial for conspiracy to violate 18 U.S.C.A. §§ 1084 and 1952, which prohibit the use of interstate wire and telephone facilities to carry on illegal gambling operations. All defendants were similarly convicted of substantive violation of § 1952, and defendants Masterana and Doolittle were also convicted of substantive violations of § 1084. The convictions were obtained primarily by the use of conversations intercepted by a wiretap authorized by the district court under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.A. §§ 2510-2520, and the fruits of searches for which the wiretap provided probable cause. Recognizing that without this evidence the Government's case would be substantially weakened, if not destroyed, defendants mounted a multi-faceted assault on the wiretap in a motion to suppress the evidence in the district court. The district court denied the motion, and the convictions followed. The attack has been renewed in this Court, but like the district court, we find no infirmity warranting suppression of the evidence and affirm all convictions.

[1] Defendants first attack the wiretap provisions of the Omnibus Crime Control Act as unconstitutional for violations of the First, Fourth, Fifth and Sixth Amendments. We have recently upheld this portion of the statute against a similar constitutional attack. United States v. Sklaroff, 506 F.2d 837 (5th Cir. 1975).

[2] Next the defendants assert that various procedural irregularities in the authorization of the wiretap request within the Justice Department require that the evidence be suppressed. *See* 18 U.S.C.A. § 2515. The Supreme Court of the United States has ruled that irregularities of the kind asserted here do not render the communications "unlawfully intercepted" or the interception request "insufficient on its face." United States v. Chavez, 416 U.S. 562, 94 S.Ct. 1849, 40 L.Ed.2d 380 (1974); *see* 18 U.S.C.A. §§ 2518(10)(a)(i), 2518(10)(a)(ii). At the time this case was argued, the Supreme Court had not decided *Chavez* and appellants relied on the Ninth Circuit decision in that case. United States v. Chavez, 478 F.2d 512 (9th Cir. 1973). The Supreme Court modified that portion of the Ninth Circuit decision upon which the appellants relied. We find nothing in this case to warrant a different result than that determined by the Supreme Court in *Chavez*. Considering the other information contained in the Interception Order Authorization, such as the location of the phones to be tapped, address of the Sportsman's Club, and its owner, we find the one incorrect digit in one of the four telephone numbers listed therein to be an immaterial variation from the actual, correct number for which the tap was requested of the district court. *Cf.* United States v. Chavez, *supra*.

[3] The procedure of filing the affidavits of the Attorney General and his subordinates, as a method of proving the administrative history of the specific

authorization in this case, is identical to that used in *Chavez*. There is no constitutional infirmity in the district court's refusal to require more of the Attorney General on this narrow issue of fact.

[4] Appellants contend that the use of a "pen register," as in this case, is not specifically authorized by Title III and must, therefore, be considered rejected by Congress as an appropriate investigative tool. The Act does not prohibit the use of pen registers and we do not view its use in this case, based upon probable cause and with a separate authorization from the district court, as being constitutionally offensive. *See* United States v. Giordano, 416 U.S. 505, 553-554, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974) (Powell, joined by the Chief Justice, and Blackmun and Rehnquist, JJ., concurring in part and dissenting in part); United States v. Finn, 502 F.2d 938 (7th Cir. 1974); United States v. Brick, 502 F.2d 219, 223 (8th Cir. 1974); *cf.* United States v. Falcone, 364 F.Supp. 877 (D.N. J. 1973), aff'd, 500 F.2d 1401 (3rd Cir. 1974).

[5, 6] Certain defendants assert that the Government lacked probable cause to believe that their conversations would be intercepted by the wiretap. They contend that this lack of probable cause should render the tap unlawful as to them. A similar argument has been rejected by the Supreme Court in United States v. Kahn, 415 U.S. 143, 94 S.Ct. 977, 39 L.Ed.2d 225 (1974). At oral argument, the appellants relied upon the Seventh Circuit decision in United States v. Kahn, 471 F.2d 191 (7th Cir.

1972). The reversal by the Supreme Court of the Seventh Circuit decision is dispositive of the issue as framed here. The statute does not require that there be probable cause as to all persons whose conversations are intercepted. *See* 18 U.S.C.A. § 2518 (1)(b)(iv). Since the wiretap in this case was validly issued, the wiretap conversations of those individuals not known to be involved in criminal activity at the time of the court authorization may be used against them.

[7] The wiretap authorization referred to "Billy Cecil Doolittle and others as yet unknown." Anderson and Baxter contend that the Government had reasonable cause to believe that their conversations would be intercepted. Relying on certain language in the Supreme Court's opinion in *Kahn*, they argue that, not being "unknown," they should have been named in the authorization. They contend that since they were not named, the wiretap order was illegal as to their conversations. The same argument could be made for Sanders. We reject this argument. The defendants neither allege nor demonstrate any prejudice to them in not being named in the authorization. The Government contends that its agents had personal knowledge, as opposed to information, to support probable cause as to illegal activity only of Doolittle, the co-owner of the Sportsman's Club, the establishment wherein the telephones were located and to which the telephone bills were sent. All defendants received an inventory of the intercepted conversations, were allowed to listen to the tapes

and received transcripts of the conversations prior to use against them at trial, as if they had been named in the order. Most of the conversations of each defendant were with Doolittle, the person named in the order. There is no indication of bad faith or attempted subterfuge by the Government in its wiretap application. The application and affidavit delineated specifically the information expected to be gathered from the tap. We hold there was substantial compliance with the requirements of the Act, and that the failure to name other defendants does not render the evidence obtained as to them inadmissible under 18 U.S.C.A. § 2518(10)(a).

[8] The last general attack by all defendants is that the wiretaps exceeded the scope of the interceptions authorized by the court order. The testimony by the monitoring agent at the suppression hearing reveals that they listened to each call only long enough to determine whether in their judgment it could be one dealing with gambling as authorized to be intercepted by the district court. Only those calls which the agents reasonably believed were related to gambling were recorded on tape. There is no question that some irrelevant and personal portions of gambling conversations were intercepted or that certain nonpertinent conversations were intercepted. But this is inherent in the type of interception authorized by Title III, and we do not view the simple inclusion of such conversations, without more, as vitiating an otherwise valid wiretap. The procedure testified to by the agents appears a reasonable method for complying with the order of the district court, in accord with the statutory mandate that the interception be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under Title III. United States v. Cox, 462 F.2d 1293 (8th Cir. 1972), cert. denied, 417 U.S. 918, 94 S.Ct. 2623, 41 L.Ed.2d 223 (1974).

[9] The district court specifically found that defendants Malloway and Baxter lacked actual knowledge of the use of interstate facilities in the gambling operation. This lack of specific knowledge is legally irrelevant. The words of § 1952 do not require specific knowledge of the use of interstate facilities and we agree with the decisions in other Circuits that such knowledge is not a prerequisite to criminal liability thereunder. *See, e. g.*, United States v. Roselli, 432 F.2d 879 (9th Cir. 1970), cert. denied, 401 U.S. 924, 91 S.Ct. 883, 27 L.Ed.2d 828 (1971); United States v. Hanon, 428 F.2d 101 (8th Cir. 1970), cert. denied, 402 U.S. 952, 91 S.Ct. 1608, 29 L.Ed.2d 122 (1971); United States v. Miller, 379 F.2d 483 (7th Cir.), cert. denied, 389 U.S. 930, 88 S.Ct. 291, 19 L.Ed.2d 281 (1967).

[10] Anderson individually challenges the district court's handling of his evidentiary objection to certain of the intercepted conversations as hearsay. The trial court's rulings on this matter shows a clear understanding of the law on the exception to the hearsay rule which applies to statements made by co-conspirators in furtherance of the conspiracy. *See,*

e. g., United States v. Register, 496 F.2d 1072, 1078-1079 (5th Cir. 1974); United States v. Williamson, 482 F.2d 508, 513 (5th Cir. 1973). An examination of the record shows sufficient independent evidence of the existence of a conspiracy to which Anderson was a party to warrant the introduction of the hearsay conversations against him.

Affirmed.

THORNBERRY, Circuit Judge (concurring in part and dissenting in part):

I concur in the decision affirming the convictions of Doolittle, Malloway, and Masterana. With regard to appellants Anderson, Baxter, and Sanders, however, I would reverse; hence I respectfully dissent from so much of the majority opinion as affirms their convictions.

I do so not without reluctance, for the majority admirably attempts to demonstrate that the latter defendants were not prejudiced by the procedure under which their intercepted telephone communications were used against them at trial. That is while these defendants enjoyed along with every member of the public a Congressionally-recognized interest in individual privacy, their interest must be balanced against the government's interest in enforcing laws relating to the crimes enumerated in 18 U.S.C. § 2516(1)(a)-(g). Under the circumstances of this case, these defendants having obtained inventories

and access to the evidence, the majority necessarily reasons that the governmental interest must prevail.

If the choice were ours to make, I probably would not quarrel with the majority's conclusions that "there was substantial compliance with the requirements of [Title III]," and, consequently, no requirement of suppression as to Anderson, Baxter, and Sanders due to the failure of the government and the district court to name them in either the wiretap application or the resulting order. The controlling issue of statutory construction, however—an issue with which the majority does not come to grips—has already been decided rather clearly by the Supreme Court. It is in the application of the Court's rule of statutory construction[1] to the facts that I find myself in basic disagreement with the majority.

In United States v. Kahn, 415 U.S. 143, 155, 94 S.Ct. 977, 984, 39 L.Ed.2d 225, 237 (1974), the square holding is as follows:

> We conclude, therefore, that Title III requires the naming of a person in the application or interception order only when the law enforcement authorities have probable cause to believe

---

[1] The pertinent provisions of 18 U.S.C. § 2518 are:

(1) (b) (iv)—"Each application shall include the following information: . . . the identity of the person, if known, committing the offense and whose communications are to be intercepted. . . ."

(4) (a)—"Each order authorizing or approving the interception of any wire or oral communication shall specify—the identity of the person, if known, whose communications are to be intercepted . . ."

> that the individual is "committing the offense" for which the wiretap is sought. Since it is undisputed that the Government had no reason to suspect Minnie Kahn of complicity in the gambling business before the wire interceptions here began, it follows that under the statute she was among the class of persons "as yet unknown" covered by Judge Campbell's order.

Having so held, the Court proceeded to reverse the Seventh Circuit, which had ordered Minnie Kahn's gambling-related telephone conversations suppressed, albeit for reasons more onerous to the government than the test announced by the Supreme Court.

Perhaps apprehensive about its quick dismissal of *Kahn* in this case, the majority somehow divines a contention by the government that probable cause to suspect participation "in the gambling business" existed only as to Doolittle at the time when wiretap authorization was sought. The majority suggests that this absence of probable cause as to the "others as yet unknown" may have resulted from government possession of mere hearsay information, rather than personal observation by investigating agents, concerning the behavior of these "others." Such a dichotomy, if seriously advanced, could indeed effect a major formulation of the law of probable cause. *See* Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); Draper v. United States, 358 U.S. 307, 311, 79 S.Ct. 329, 332, 3 L.Ed.2d 327, 331 (1959); Gonzales v.

Beto, 5th Cir. 1970, 425 F.2d 963, 968-970, cert. denied, 400 U.S. 928, 91 S.Ct. 194, 27 L.Ed.2d 189 (1970). Nor do I understand the majority to suggest that "probable cause" as to a given individual or telephone number connotes a more demanding standard when wiretaps are used by contrast to other types of searches. Again such a suggestion would, in my view, be erroneous. *See* United States v. Falcone, 3rd Cir. 1974, 505 F.2d 478, 481, United States v. Finn, 7th Cir. 1974, 502 F.2d 938, 941. The question with which I shall attempt to deal, then, is whether at the time when wiretap authorization was sought, the government had probable cause to suspect that Anderson, Baxter, and Sanders were conspiring with or assisting Doolittle in illegal gambling involving the use of the telephone at the Sportman's Club. For reference, reproduced in the margin [2] are the

---

[2]

APPLICATION

(Number and Title Omitted)

Charles T. Erion, an Assistant United States Attorney, Middle District of Georgia, being duly sworn states:

This sworn application is submitted in support of an order authorizing the interception of wire communications. This application has been submitted only after lengthy discussion concerning the necessity for such an application with various officials of the Organized Crime and Racketeering Section, United States Department of Justice, Washington, D. C., together with Agents of the Federal Bureau of Investigation.

1. He is an "investigative or law enforcement officer—of the United States" within the meaning of Section 2510(7) of Title 18, United States Code, that is—he is an attorney authorized by law to prosecute or participate in the prosecution

of offenses enumerated in Section 2516 of Title 18, United States Code.

2. Pursuant to the powers conferred on him by Section 2516 of Title 18, United States Code, the Attorney General of the United States, the Honorable John N. Mitchell, has specially designated the Assistant Attorney General for the Criminal Division of the United States Department of Justice, the Honorable Will Wilson, to authorize affiant to make this application for an order authorizing the interception of wire comcunications. The letter of authorization signed by the Assistant Attorney General is attached to this application as Exhibit A.

[516] 3. This application seeks authorization to intercept wire communications of Billy Cecil Doolittle and others as yet unknown concerning offenses enumerated in Section 2516 of Title 18, United States Code, that is—offenses involving the transmission, by means of an interstate wire facility, of gambling and wagering information by a person engaged in the business of gambling, in violation of Title 18, United States Code, Section 1084, and the use of interstate telephone communication facilities for the transmission of betting information in aid of a racketeering enterprise (gambling), in violation of Section 1952 of Title 18, United States Code, and a conspiracy to commit such offenses in violation of Section 371 of Title 18, United States Code, which have been committed and are being committed by Billy Cecil Doolittle and others as yet unknown.

4. He has discussed all the circumstances of the above offenses with Special Agent Gary W. Hart of the Macon, Georgia office of the Federal Bureau of Investigation who has directed and conducted the investigation herein, and has examined the affidavit of Special Agent Hart (attached to this application as Exhibit B and incorporated by reference herein) which alleges the facts therein in order to show that:

(a) there is probable cause to believe that Billy Cecil Doolittle and others as yet unknown have committed and are committing offenses involving the transmission, by means of an interstate wire facility, of gambling and wagering information by a person engaged in the business of gambling, in violation of Title 18, United States

Code, Section 1084, and the use of interstate [517] telephone communication facilities for the transmission of betting information in aid of a racketeering enterprise (gambling), in violation of Section 1952 of Title 18, United States Code, and are conspiring to commit such effenses in violation of Section 371 of Title 18, United States Code.

(b) there is probable cause to believe that particular wire communications of Billy Cecil Doolittle and others as yet unknown concerning these offenses will be obtained through the interception, authorization for which is herewith applied for. In particular, these wire communications will concern the interstate transmission of gambling information relating the outcome of professional baseball games and the dissemination of such information to persons engaged in the unlawful business of gambling, and the participants in the commission of said offenses.

(c) normal investigative procedures reasonably appear appear to be unlikely to succeed and are too dangerous to be used.

(d) there is probable cause to believe that the telephones listed to the Sportsman's Club located in the premises of the Sportsman's Club, 222 Third Street, Macon, Georgia, and carrying telephone numbers 912-746-9110, 912-745-2843, 912-745-2844, and 912-745-2845 have been used and are being used by Billy Cecil Doolittle and others as yet unknown [518] in connection with the commission of the above-described offenses.

5. No previous application has been made to any Judge for authorization to intercept or for approval of interception of wire or oral communications involving any of the same persons, facilities, or places specified herein.

WHEREFORE, your affiant believes that probable cause exists to believe that Billy Cecil Doolittle and others as yet unknown are engaged in the commission of offenses involving the transmission of gambling and wagering information by means of an interstate wire facility, by a person engaged in the business of gambling and the use of interstate telephone communication facilities for the transmission of betting infor-

mation in aid of a racketeering enterprise (gambling), and a conspiracy to do so; that Billy Cecil Doolittle and others as yet unknown have used, and are using the telephone listed to the Sportsman's Club, located at 222 Third Street, Macon, Georgia, and bearing numbers 912-746-9110, 912-745-2843, 912-745-2844, and 912-745-2845, in connection with the commission of the above-described offenses; that communications of Billy Cecil Doolittle and others as yet unknown concerning these offenses will be intercepted to and from the above-described telephone; and that normal investigative procedures appear unlikely to succeed and are too dangerous to be used.

On the basis of the allegations contained in this application and on the basis of the affidavit of Special Agent Hart, which is attached hereto and made a part hereof, affiant requests this court to issue an order, pursuant to the power conferred on it by Section 2518 of Title 18, United States Code, authorizing the Federal Bureau of Investigation of the United States Department of Justice to intercept wire communications to and from the above-described telephones until [519] communications are intercepted which reveal the manner in which Billy Cecil Doolittle and others as yet unknown participate in the illegal use of interstate telephone facilities for the transmission of betting information in aid of a racketeering enterprise (gambling), and which reveal the identies of his confederates, their places of operation, and the nature of the conspiracy involved therein, or for a period of fifteen (15) days from the date of that order, whichever is earlier.

/s/ Charles T. Erion
CHARLES T. ERION
Assistant United States
Attorney
Middle District of Georgia

Subscribed and sworn to before me this 21 day of August, 1970.

/s/ W. A. Bootle
United States District Judge

[Footnote continued on page 27a]

[2] [Continued]

AFFIDAVIT OF GARY W. HART

Gary W. Hart, Special Agent, Federal Bureau of Investigation, Macon, Georgia, being duly sworn, states:

1. I am an "investigative or law enforcement officer of the United States" within the meaning of Section 2510(7) of Title 18, United States Code—that is, an officer of the United States who is empowered by law to conduct investigations of and to make arrests for offenses enumerated in Section 2516 of Title 18, United States Code.

2. I have conducted an investigation of the offenses of Billy Cecil Doolittle and, as a result of my personal participation in that investigation and of reports made to me by other agents, I am familiar with all the circumstances of the offenses.

3. A confidential informant who has admitted personal participation in gambling activities, has stated that Doolittle operates a bookmaking operation in the Sportsman's Club, located at 222 Third Street, Macon, Georgia. Doolittle is assisted in his bookmaking operation by Will Sanders who is a full partner. Doolittle obtains the "line" for professional baseball games from an unknown individual by placing a call from a pay telephone booth located in the poolroom of the Sportsman's Club at approximately noon each day, and Doolittle and Sanders thereafter disseminate the "line," accept wagers on professional baseball games, and "lay off" bets through use of several telephones, one of which is numbered 745-2844, located in the "members only" room of the Sportsman's Club which is adjacent to the pool room. Among individuals contacted by Doolittle and his associates in this manner are Cliff Anderson of Columbus, Georgia, and Billy Baxter of Augusta, Georgia.

I have established through independent investigation that this informant has had the opportunity to obtain first-hand knowledge of the activities the informant has described. This informant has been contacted by Special Agents of the Federal Bureau of Investigation [521] on several occasions since January 1970 and on four occasions the informant has furnished information which has been determined to be accurate by independent investigation. On a date during the week

beginning on August 2, 1970, this informant stated that within five (5) days prior to that date through personal observation of Doolittle's activities in the Sportsman's Club, the informant determined that Doolittle is currently operating as described in the preceding paragraph. This informant further stated that through first-hand knowledge the informant knows that Anderson and Baxter are engaged in accepting wagers on the outcome of professional baseball games as of a date during the week beginning on August 2, 1970.

4. A second confidential informant who has admitted personal participation in gambling activities has also stated that Doolittle operates a bookmaking operation in the Sportsman's Club located at 222 Third Street, Macon, Georgia, in a room off the pool hall area of the building. Further, informant states that during the 1970 professional baseball season, Doolittle, assisted by Will Sanders who is a partner, has utilized telephones, one of which is numbered 745-2844, located in this room to facilitate the placing and acceptance of wagers based upon the outcome of professional baseball games. Doolittle is associated with Cliff Anderson of Columbus, Georgia, and Billy Baxter of Augusta, Georgia, and he participates with these individuals, and others unknown, in the placing and accepting of wagers based upon the outcome of professional baseball games. Doolittle is associated with Cliff Anderson games by placing a call from a pay telephone booth located in the Sportsman's Club at approximately noon each day, and subsequently supplies this line to the aforementioned to assist them in the placing and acceptance of wagers based on the outcome of professional baseball games.

[522] I have established through independent investigation that this informant has had the opportunity to obtain first-hand knowledge of the activities the informant has described. This informant has been contacted by Special Agents of the Federal Bureau of Investigation on several occasions since January 1970 and on 22 occasions the informant has furnished information which has been determined to be accurate by independent investigation. On a date during the week beginning on August 9, 1970, this informant stated that within five (5) days prior to that date, through personal conversation with one of the principals at the Sportsman's Club, the

government's wiretap application and supporting affidavit of Special Agent Gary W. Hart, insofar as these materials are illuminative of the question at hand.

Among the features of these materials which convince me that law enforcement officers had probable cause as to Anderson, Baxter, and Sanders are the following: (a) The basis of the application was Hart's affidavit. Repeatedly Hart explicitly refers to a telephone wagering operation conducted over the Sportsman's Club telephone by Doolittle, Anderson, Baxter, and Sanders. (b) Hart avers that these ac-

informant determined that Doolittle is currently operating as described in the preceding paragraph. This informant further stated that through first-hand knowledge the informant knows that Anderson and Baxter are engaged in accepting wagers on the outcome of professional baseball games as of a date during the week beginning on August 9, 1970.

* * * *

6. Examination of the records of the Macon, Georgia, Credit Bureau on April 27, 1970, disclosed that Doolittle and William A. Sanders, Jr., are listed as owners of the Sportsman's Club, Macon, Georgia. Sanders was also listed as a former employee of the Southern Bell Telephone Company for 13 years.

* * * *

/s/ Gary W. Hart
Special Agent
Federal Bureau of
Investigation

Subscribed and sworn before me this 21 day of August, 1970

/s/ W. A. Bottle
United States District Judge

tivities were reported to him by confidential informants, alleged upon Hart's oath to have made declarations against penal interest as indicia of reliability, one of whom is further alleged to have given reliable information on twenty-two prior occasions. (c) The information is quite specific with respect to the players, their roles, certain wagered athletic contests, and the physical setting. (d) Hart avers that this specificity is the product of personal knowledge on the part of the informants, whose personal knowledge Hart swears he has verified through "independent investigation." Without belaboring the point, I simply confess my bemusement that if the Hart affidavit did not provide probable cause as to Anderson, Baxter, and Sanders, I do not know what would. *See* Gonzales v. Beto, *supra*, 425 F.2d at 968-969; *see also* Polanco v. Estelle, 5th Cir. 1975, 507 F.2d 81 ("in judging probable cause magistrates are not to be confined by restrictions on their use of common sense"); United States v. James, 9th Cir. 1974, 494 F.2d 1007; United States v. McHale, 7th Cir. 1974, 495 F.2d 15. Yet, for reasons not entirely apparent to this court, the government saw to it that neither the application nor the order made reference to any of these three defendants.[3]

The government's own statements shed additional light on the issue. When this appeal was briefed, the Supreme Court had not yet decided *Kahn*. At

[3] The district court, in drawing the wiretap order, simply adopted the "others as yet unknown" language used by the government in its application.

that time the government's position was that the term "person, if known," as used in § 2518(1)(b)(iv) and 4(a), meant only the "subject" of the interception, whom the government contended was Doolittle. Not anticipating that the Supreme Court would choose a middle ground between its argument and the "discoverability" test successfully advanced by Minnie Kahn in the Seventh Circuit, the government stated in its brief to this court:

> The application in the present case demonstrated that agents of the government actually "knew," that is had personal knowledge as opposed to information, of only one defendant who was using the phones in question: defendant Doolittle, the person named in the order. They and the Court had nothing more than "probable cause to believe" that Anderson and Baxter [and Sanders] would be intercepted.[4]

Or, I would add, that these three were "committing the offense" for which the wiretap was sought.

Thus, the majority manufactures for the government a result which reflects considerable profit from inconsistent positions, while purging the government's contention of any adverse consequences, however logical or proper they may be. Appellant Anderson argues that in this respect—the government should now be estopped. There may be merit to Anderson's argument, inasmuch as the government was equally as capable as appellants to anticipate what the Supreme Court would hold in *Kahn*. I

[4] Brief for the government at 28-29.

need not rest my views on estoppel, however, since I have already concluded that the requisite probable cause existed as to Anderson, Baxter, and Sanders at the time when tap authorization was sought. Under *Kahn*, therefore, I would reverse as to these three with directions to the district court to suppress their intercepted communications pursuant to 18 U.S.C. § 2518(10)(a)(ii) ("order of authorization or approval under which it was intercepted is insufficient on its face").[5]

---

[5] Although the majority does not make this argument in support of its conclusion that Title III was substantially complied with, one might contend that paragraph 4 of the wiretap application, which purports to incorporate the Hart affidavit by reference, operated in legal usage to name Anderson, Baxter, and Sanders insofar as § 2518(1)(b)(iv) required that they be named in the application. One might then argue that since neither the application, the supporting affidavit, nor the order in *Kahn* mentioned Minnie Kahn, and that since the Supreme Court phrased its holding disjunctively in terms of naming a person in the application *or* interception order, the Court implied thereby that the naming of probable cause suspects in *either* the application or the order would satisfy the statute. I may assume that the incorporation by reference operated to name Anderson, Baxter, and Sanders in the application, but I reject the idea that *Kahn* supports or implies the rest of the argument. First, the significant feature of *Kahn* is its emphasis on the literal language and terms of Title III. In addition to requiring, under *Kahn*, the naming of probable cause suspects in the application, Title III literally requires that they also be named in the order. § 2518(4)(a). That was not done in this case, and *Kahn*—inasmuch as it involved no question of half-compliance, through incorporation by reference or otherwise—cannot be deemed to support an analysis which runs counter to the statute's literal provisions. Second, although *Kahn* holds that the district court's duty to include names in the order is no broader than the

---

government's duty to include them in the application, the Court explicitly recognized that "[s]ection 2518(4)(a) requires that the order specify 'the identity of the person, if known, whose communications are to be intercepted.'" 415 U.S. at 151, 94 S.Ct. at 982, 39 L.Ed.2d at 234. This part of the Court's discussion does strongly imply a responsibility on the government to see that the names of its probable cause suspects are placed in the court's order—the operative document for initiating a lawful wiretap—as well as the application. This responsibility arises because "the judge who prepares the order can only be expected to learn of the target individual's identity through reference to the original application . . ." *Id.*

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 593126 35

Supreme Court, U. S.
FILED
SEP 29 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1486

UNITED STATES OF AMERICA,
Petitioner,

v.

CALMAN BERNSTEIN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MEMORANDUM OF CALMAN BERNSTEIN, RESPONDENT, IN REPLY TO SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

ARNOLD M. WEINER,
M. ALBERT FIGINSKI,
10 Light Street, Suite 1200,
Baltimore, Maryland 21202,
Attorneys for Respondent.

The Daily Record Co., Baltimore, Md. 21202

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1486

UNITED STATES OF AMERICA,
Petitioner,

v.

CALMAN BERNSTEIN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MEMORANDUM OF CALMAN BERNSTEIN, RESPONDENT, IN REPLY TO SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

1. The Government urges that, as a result of the recent *en banc* decision of the Fifth Circuit, in *United States v. Doolittle,* . . . F.2d . . ., there is now a genuine conflict among the Circuits. We suggest, however, that the conflict is not of sufficient importance to justify the granting of certiorari for review of the present case. We note that, with the exception of *Doolittle,* every other

court which has considered this issue has reached the same result as the Court of Appeals here. See: *United States v. Donovan,* 513 F.2d 337 (6th Cir., 1975); *United States v. Moore,* 513 F.2d 485 (D.C. Cir., 1975); and *Carter v. State,* 337 A.2d 415, 425 (Md., 1975). It is highly doubtful that *Doolittle* will stand as persuasive authority for any other court. In *Doolittle,* as the Government itself acknowledges, neither the opinion of the panel nor that of the court *en banc* discussed the "serious practical" questions inherent in a full consideration of the problem (Pet. Supp. Memo., p. 2). It should be noted that six judges of the Court of Appeals for the Fifth Circuit dissented in *Doolittle.* The dissenting opinions of Judges Thornberry and Godbold exposed the serious flaws in the opinion of the slim majority of their Court.

2. Taking note of its subsequent petition in *United States v. Donovan,* No. 75-212, also pending before this Court, the Government asserts that *Donovan* raises the same issues presented here. The Government asks this Court to consider *Donovan* plenarily, or, alternately, to grant *Donovan* and to hold the petition in this case for disposition after the decision in *Donovan.* We suggest, to the contrary, that, if certiorari is to be granted, the present case, rather than *Donovan,* is more appropriate for full consideration. Our reasons include the following:

A. In the present case, as in *Donovan,* the threshold question is whether the respondent was "known" to the applicant for the eavesdropping. The statute, 18 U.S.C. 2518(1)(b)(iv), requires only that "known" persons be named in the application and order. Here, the detailed findings of the District Judge established that the respondent was a target of the investigation and that he was known to be both a

participant in the criminal activity and a user of the intercepted telephone line (Pet. App. E, pp. 37a-45a; Jt. App. 461-64). In *Donovan,* on the other hand, it is not at all clear that the respondents were "known" within the meaning of the statute. Testimony presented there indicated that, as to some of the respondents at least, the Government claimed only to have "suspicions" and that there was "an apparent lack of communication" among those engaged in the investigation. See, *United States v. Donovan,* 513 F.2d 337, 341-43 (6th Cir., 1975).

B. The present case involves a significantly different and more aggravated failure to adhere to the statute than presented in *Donovan.* The circumstances of this case were so compelling as to lead the District Judge to conclude that failure to name the respondent in the eavesdropping application and order had been "tantamount to demonstrating a conscious disregard for the dictates of Title III" (Pet. App. E, pp. 36a, 45a; Jt. App. 460-61). In *Donovan,* on the other hand, it appears from the opinion of the Court of Appeals that the failure to name the respondents might only have been "inadvertent" (513 F.2d 337, 341).

C. Because this case, unlike *Donovan,* involves deliberate denigration of the statutory requirement, the suppression sanction might be appropriate here but inappropriate in *Donovan.* Cf., *United States v. Eastman,* 465 F.2d 1057 (3rd Cir., 1972). If this Court were to consider the nature of the statutory violation as an element in the determination whether the suppression sanction should be employed, the present case would be a more appropriate vehicle for such a purpose.

D. *Donovan,* unlike this case, presents multiple issues. The order of the Court of Appeals in *Donovan* could be affirmed on the basis of the other issue, failing to give inventory notice as required by 18 U.S.C.

2518(8)(d), without any resolution of the question relating to the failure to name known subjects as required by §2518(1)(b)(iv).

Respectfully submitted,

ARNOLD M. WEINER,
M. ALBERT FIGINSKI,
10 Light Street, Suite 1200,
Baltimore, Maryland 21202,
Attorneys for Respondent.